

Applicant Details

First Name	Joshua
Last Name	Pitkoff
Citizenship Status	U. S. Citizen
Email Address	jip230@nyu.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>78 Hack Green Road</div> <div>City</div> <div>Pound Ridge</div> <div>State/Territory</div> <div>New York</div> <div>Zip</div> <div>10576</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	9149245391

Applicant Education

BA/BS From	Princeton University
Date of BA/BS	June 2016
JD/LLB From	New York University School of Law
	https://www.law.nyu.edu
Date of JD/LLB	June 1, 2021
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Environmental Law Journal
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Gillers, Stephen
stephen.gillers@nyu.edu
(212) 998-6264

Brooks, Richard
rrb5@nyu.edu
(212) 998-6619

Stewart, Richard
richard.stewart@nyu.edu
(212) 998-6170

This applicant has certified that all data entered in this profile and any application documents are true and correct.

January 26, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am writing to apply for a 2023-2024 term clerkship in your chambers, or for any subsequent term. I'm a recent graduate of NYU School of Law and am currently working as a Litigation Associate at Davis Polk & Wardwell.

Enclosed please find my resume, transcripts, and writing sample. The writing sample is an excerpt from a simulation brief, written for my course in Federal Courts, which is based on a fictionalized fact pattern and was not edited by others.

Recommendation letters will be provided by the following NYU Law professors:

Richard R.W. Brooks - richard.brooks@nyu.edu - 212-998-6619
Richard Stewart - richard.stewart@nyu.edu - 212-998-6170
Stephen Gillers - stephen.gillers@nyu.edu - 212-998-6264

Judge Harry Edwards (D.C. Cir.), who taught my seminar last fall in "Federal Courts and the Appellate Process," has also kindly agreed to serve as a reference: JudgeHTE@cadc.uscourts.gov, 202-216-7380.

Thank you for your consideration and I look forward to hearing from you.

Respectfully,
Joshua Pitkoff

JOSHUA PITKOFF

205 W 88th Street, Apt 11H, New York, NY 10024
(914) 924-5391 | jpitkoff@gmail.com

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

J.D., *magna cum laude*, May 2021

Unofficial GPA: 3.82

Honors: Order of the Coif: Top 10% of class
Florence Allen Scholar: Top 10% of class after four semesters
Environmental Law Journal, Senior Notes Editor
Activities: Law and Political Economy Association, Treasurer
Law Students for Economic Justice, Board Member
Civil Legal Advice and Resource Office, Volunteer
Student Note: *State Bans on Labeling for Alternative Meat Products*, 29 N.Y.U. Envtl. L.J. 301-352 (2021).

PRINCETON UNIVERSITY, Princeton, NJ

A.B. in Philosophy, *magna cum laude*, May 2016

Honors: Phi Beta Kappa
Harold Willis Dodds Achievement Prize (awarded to the senior who “best embodies the qualities of clear thinking, moral courage, and a patient and judicious regard for the opinions of others”)
Senior Thesis: *Moral Luck: Aretaic Judgments and Responsibility Tout Court*
Publication: *Philosophical and Theological Problems of Religious Language*. The Dualist Journal, Vol. 21, 21-45. June 2017.
Activities: Hillel/Center for Jewish Life, Student Board President
Faculty-Student Committee on Discipline, Student Member
Forbes College, Residential College Advisor

EXPERIENCE

DAVIS POLK & WARDWELL, New York, NY

Associate, October 2021 – present; *Summer Associate*, July 2020 – August 2020

Drafted appellate brief for pro bono litigation effort. Supported antitrust, securities, and tax litigation matters with legal and factual research. Participated in analysis of structured products for tax disclosure.

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Research Assistant, Professor Clayton Gillette, Fall 2019

Supported New York City’s Taxi Medallion Commission by researching and analyzing bankruptcy filings to assess the impact of loan terms on the crash in taxi medallion values.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, ANTITRUST BUREAU, New York, NY

Legal Intern, June 2019 – August 2019

Supported investigation and litigation of Clayton Act merger reviews and Sherman Act monopolization, group boycott, and exclusionary conduct matters. Activities included subpoena drafting, legal and financial research, and document review. Presented to Bureau on development of ongoing antitrust case in the technology sector.

EY-PARTHENON, New York, NY

Senior Associate, September 2016 – July 2018

Conducted market due diligence and growth strategy assessments on 30 projects in industries including health care, legal services, and technology. Balanced multiple ongoing projects and managed first-year associates. Projects included: Drafting interview guides and conducting research interviews with 25+ suppliers, distributors, and telecom operators to assess market demand and competitive landscape for fiber equipment; developing total addressable market size for corporate compliance investigations and monitorships; assessing locations’ favorability for physician practice groups by comparing local data on physician supply, patient demographics and insurer concentration.

ADDITIONAL INFORMATION

New Yorker magazine, CitiBike, and former MoviePass enthusiast. Amateur sourdough bread baker.

Name: Joshua I Pitkoff
 Print Date: 06/01/2021
 Student ID: N14514000
 Institution ID: 002785
 Page: 1 of 1

**New York University
 Beginning of School of Law Record**

School of Law
 Juris Doctor
 Major: Law

Fall 2018

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 Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
 --

School of Law Juris Doctor Major: Law				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Amanda S Sen			
Criminal Law		LAW-LW 11147	4.0	B+
Instructor:	Randy Hertz			
Procedure		LAW-LW 11650	5.0	B+
Instructor:	Oscar G Chase			
Contracts		LAW-LW 11672	4.0	A
Instructor:	Richard Rexford Wayne Brooks			
1L Reading Group		LAW-LW 12339	0.0	CR
Topic:	Corporate Crime and Financial			
Instructor:	Jennifer Hall Arlen			
		AHRS	EHSR	
Current		15.5	15.5	
Cumulative		15.5	15.5	

Antitrust & Regulatory Alternatives I	LAW-LW 11348	3.0	CR
Instructor:	Harry First		
Constitutional Law	LAW-LW 11702	4.0	CR
Instructor:	Melissa E Murray		
Estate and Gift Taxation	LAW-LW 11893	3.0	CR
Instructor:	Noel B Cunningham		
Contract Theory and Law Colloquium	LAW-LW 12659	3.0	CR
Instructor:	Liam B Murphy		
	Richard Rexford Wayne Brooks		
		AHRS	EHSR
Current		13.0	13.0
Cumulative		57.0	57.0
Allen Scholar-top 10% of students in the class after four semesters			

Spring 2019

School of Law Juris Doctor Major: Law				
Property		LAW-LW 10427	4.0	A-
Instructor:	Katrina M Wyman			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Amanda S Sen			
Legislation and the Regulatory State		LAW-LW 10925	4.0	A+
Instructor:	Deborah C Malamud			
Torts		LAW-LW 11275	4.0	A
Instructor:	Barry E Adler			
1L Reading Group		LAW-LW 12339	0.0	CR
Topic:	Corporate Crime and Financial			
Topic:	Corporate Crime and Financial			
Instructor:	Jennifer Hall Arlen			
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR
		AHRS	EHSR	
Current		14.5	14.5	
Cumulative		30.0	30.0	

Fall 2020

School of Law			
Juris Doctor			
Major: Law			
Art Law	LAW-LW 10122	4.0	B+
Instructor:	Amy M Adler		
Federal Courts and The Appellate Process	LAW-LW 10917	4.0	A
Instructor:	Harry T Edwards		
	Elizabeth G Caldwell		
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	3.0	A
Instructor:	Stephen Gillers		
Policy Analysis	LAW-LW 12695	4.0	CR
Instructor:	Ryan J Bubb		
		<u>AHRS</u>	<u>EHRS</u>
Current		15.0	15.0
Cumulative		72.0	72.0

Spring 2021

School of Law Juris Doctor Major: Law				
Law & Literature Seminar		LAW-LW 10357	2.0	A
Instructor:	Stephen Gillers			
	Catharine R Stimpson			
Corporations		LAW-LW 10644	5.0	A-
Instructor:	Emiliano Octavio Marambio Catan			
Income Taxation		LAW-LW 11994	4.0	A
Instructor:	David Carl Kamin			
Food and Agricultural Law and Policy Seminar		LAW-LW 12154	2.0	A
Instructor:	Richard B Stewart			
Food and Agricultural Law and Policy Seminar		LAW-LW 12560	1.0	A
Writing Credit				
Instructor:	Richard B Stewart			
		AHRS	EHSR	
Current		14.0	14.0	
Cumulative		44.0	44.0	

Spring 2021			
School of Law			
Juris Doctor			
Major: Law			
Environmental Law Journal	LAW-LW 11165	2.0	CR
Legal Theory Thesis Seminar	LAW-LW 11387	3.0	A
Instructor: Lewis A Kornhauser			
Antitrust Counseling in the Distribution of Goods and Services	LAW-LW 11546	2.0	A
Instructor: Irving Scher			
Federal Courts and the Federal System	LAW-LW 11722	4.0	CR
Instructor: Helen Hershkoff			
Advanced Topics in Art Law Seminar	LAW-LW 12058	2.0	A
Instructor: Amy M Adler			
Donn Zaretsky			
		<u>AHRS</u>	<u>EHSR</u>
Current		13.0	13.0
Cumulative		85.0	85.0
Staff Editor - Environmental Law Journal 2019-2020			
Senior Notes Editor - Environmental Law Journal 2020-2021			

End of School of Law Record

Spring 2020

Joshua Pitkoff
Princeton University
Cumulative GPA: 3.84

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Macroeconomics	Elizabeth Bogan	A-		
From Berlin to Hollywood: Music, Film and Cultural Diaspora	Christopher Hailey	A-		
Reading Literature: Poetry	Susan Stewart	A-		
The Politics of Modern Islam	Bernard Haykel	B+		

Honors:

Phi Beta Kappa

Magna cum laude

Harold Willis Dodds Achievement Prize (awarded to the senior who best embodies the "qualities of clear thinking, moral courage, a patient and judicious regard for the opinions of others, and a thoroughgoing devotion to the welfare of the University and the life of the mind.")

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Elementary Biblical Hebrew	Naftali Meshel	A		
Writing Seminar: Ethics of Persuasion	Kristen Dombek	A		
Introduction to Microeconomics	Harvey Rosen	P		
General Computer Science	Douglas Clark	B		
Israeli Humor and its Roots	Esther Robbins	A		

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Fundamentals of Neuroscience	Michael Graziano	A		
Rabbinic Literature: Law, Religion & History	Moulie Vidas	A		
Introduction to Moral Philosophy	Michael Smith	A-		
19th Century Fiction	Jeff Nunokawa	A-		

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to English Literature: 14th to 18th C.	Sophie Gee	A		
The Literature of Fact (Journalism)	Evan Thomas	A-		
Introduction to Ancient Philosophy	Hendrik Lorenz	A-		

Religion and Law	Alexander Kaye	A		
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Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Molecular Biology: From DNA to Human Complexity	Bonnie Bassler & Eric Wieschaus	A		
Junior Independent Work	Sebastian Kohler	A-		Topic: Luck Egalitarianism
Philosophical Analysis from 1900 to 1950	Hans Halvorson	A+		
Nietzsche	Alexander Nehemas	A-		
American Literature: 1930-Present	Lee Mitchell	A		

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Non-Cognitivism in Ethics	Sebastian Kohler	A		
Junior Independent Work	Hans Halvorson	A		Topic: Religious Language
Civil Liberties	Robert George	P		
Personal Identity	Mark Johnson	A		
Imagined Languages	Joshua Katz & Michael Gordin	B+		

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Philosophy of Law	Gideon Rosen	A-		
History: An Introduction to the Discipline (Historiography)	Anthony Grafton	A		
Reading Literature: The Essay	Jeff Nunokawa	A+		

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introductory Logic	Hans Halvorson	A		
Milton	Russ Leo	A+		
Senior Departmental Exam		A-		
Senior Thesis	Michael Smith (Advisor)	A		Topic: Moral Luck
Religion and Ethical Theory	Jeffrey Stout	A		

New York University
A private university in the public service
 School of Law

40 Washington Square South, 422A
 New York, New York 10012-1099
 Telephone: (212) 998-6264
 FAX: (212) 995-4658
 E-mail: stephen.gillers@nyu.edu

Stephen Gillers
Elihu Root Professor of Law

January 28, 2022

The Honorable Eric Vitaliano
 Theodore Roosevelt United States Courthouse
 225 Cadman Plaza East, Room 707 S
 Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

In our Law and Literature seminar, which I've been teaching for more than twenty years with Kate Stimpson, the former dean of the graduate school, students read ten literary works, including *Antigone*, *Merchant of Venice*, *Gross Indecency: The Three Trials of Oscar Wilde*, and *The Trial*. The syllabus then continues with modern works, which vary from year to year. When Joshua was in the class, it included James Baldwin's *If Beale Street Could Talk* and Ernest Gaines' *A Lesson Before Dying*. All works have a legal or justice theme. Students write 1,000 word essays on seven of the works. There is no prompt. Students are asked to address whatever aspect of the work interests them.

Joshua Pitkoff began his essay on Baldwin this way:

The epigraph to James Baldwin's *If Beale Street Could Talk* begins the novel with lyrics from an African-American spiritual: "Mary, Mary, / What you going to name / that pretty little baby." The question is posed to the Virgin Mary asking what she will name the baby we know to be Jesus. In the novel's set-up, then, we see two ideas begin to take shape: first, that the significance of naming looms large over the novel, and second, that naming is closely tied up with religion, another of the novel's major themes. An analysis of the connection between these two aspects of the novel will also bear on its subject of the criminal justice system. While the epigraph raises these connections initially, it is the opening two paragraphs that question the value of given names as merely social convention. Through the contrast of the protagonists' "christened" names and their nicknames, the novel forces the reader to question the inherent value of our socially embedded institutions—religion and the justice system—as well as affirms the creative power we have to shape them.

This paragraph represents the quality of Josh's writing and close reading of text. I could have chosen many other paragraphs from this and other of Josh's essays to make the same point. Students come to law school with – how to put it – different experiences and talents in the use of language and a capacity for close reading. From Josh's first essay (on *Antigone*) to his last (on Bernhard Schlink's *The Reader*) it was apparent that he was especially gifted, one of the very best writers and thinkers among the 500 law and literature students we've had in this class over the decades.

When I say "apparent," I mean that his talent was immediately clear. Josh engaged with – embraced – the novel or play he was writing about. He would set out his thesis, then question his thesis, and then respond to his own questions. The clarity of his essays told me that Josh had spent time not only on his ideas, but also on his choice of words and sentence order. He knows how to be his own editor, which is a skill it takes time in practice to develop.

Reading Josh's essays was like listening to an internal dialogue between Josh and the author of the work and then between Josh and Josh. His work was what I would call intellectually honest, no corner cutting. I was often astonished at how he could go into such depth in so short a space. But he did.

Although I've been describing Josh's written work, also remarkable were his observations in class. He spoke in paragraphs and well-formed sentences that logically flowed. This would only have been possible if Josh had spent considerable time thinking about the play or novel and what it meant to him.

I was not surprised, therefore, to read Josh's answers in the clerkship questionnaire students complete. Asked to state "the adjectives that best describe you and explain your choices," Josh wrote: "I would like to think that one of my strongest assets as a clerk would be careful thinking and writing." He went on to say that the "academic work I've enjoyed most has required sensitivity to language and argument structure."

Josh did not major in literature at Princeton. He was a philosophy major. He would not have come to our class with a head start on literary criticism and textual analysis from undergraduate work. Yet his essays were immediately recognizable by their ability to drill down in the work and through their insights. He could have done as well in the class without making that extra effort. It is

Stephen Gillers - stephen.gillers@nyu.edu - (212) 998-6264

obvious to me that he did so because approaching the assignment with intellectual curiosity and engagement was important to him. It is who he is.

Dean Stimpson, my co-teacher, joins this recommendation.

Sincerely,

Stephen Gillers

Stephen Gillers - stephen.gillers@nyu.edu - (212) 998-6264

January 26, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am delighted to write this letter of recommendation on behalf of Joshua Pitkoff. Joshua enrolled in two of my courses (earning top grades in both) and wrote a substantial paper under my supervision. In addition to numerous classroom encounters, I have spent many hours in one-on-one conversation with Joshua, discussing his academic interests and professional aspirations. I know him reasonably well—his intellect, his work habits and his temperament. I have a strong sense of his professional and personal character, and it is with this extensive background that I can and do recommend him to you with the greatest possible enthusiasm. Joshua will be an excellent judicial clerk.

I first met Joshua in the fall of 2018 when he enrolled in my first-year Contracts lecture course (with approximately 85 other students). He more recently took a small seminar course with me on Contract Law and Theory. Through these courses I had many opportunities to observe and evaluate Joshua's academic and research skills. That he earned the highest grade in both courses hardly says enough about his distinctive cast of mind. Joshua is an extremely careful thinker, with a rigorous and analytical mind. In both the lecture course and the seminar format, he regularly asked intellectually compelling questions and approached each topic with a freshness of perspective uncommon among his classmates. He also displayed an unusual attentiveness to details. In classroom discussions he often identified unstated assumptions and subtleties in the formulations and legal arguments that most students completely overlooked. The clarity of his thought was also reflected in his writings, noticeable both in the context of timed examinations and in the final paper he prepared for the seminar.

In addition to his academic and intellectual abilities, Joshua is a kind and thoughtful individual. Though not shy in expressing himself, he is both warm and approachable. I sincerely believe that his personality and work ethic are perfectly matched for the intensity and demands of judicial chambers. I recommend him with the greatest confidence I can muster. I also strongly encourage you to contact me if I may provide you with any more information in support of his consideration.

Best regards,
Richard R.W. Brooks

Richard Brooks - rrb5@nyu.edu - (212) 998-6619



New York University

A private university in the public service

School of Law

40 Washington Square South, 411F

New York, New York 10012-1099

Telephone: (212) 998-6170

Facsimile: (212) 995-4590

E-mail: richard.stewart@nyu.edu

Richard B. Stewart

University Professor

John Edward Sexton Professor of Law

Director, Frank J. Guarini Center on Environmental, Energy, and Land Use Law

May 11, 2021

RE: Joshua Pitkoff, NYU Law '21

Your Honor:

It is with the greatest enthusiasm that I recommend Joshua Pitkoff to be your law clerk. He is enormously able, committed, and a great researcher and writer. I know he would be an outstanding, completely reliable clerk.

I knew Joshua as a student in my Food and Agriculture Law and Policy class. Joshua was a terrific participant in the class, totally up to speed with the materials and the issues they presented. He asked excellent questions and was a great contributor to the class discussion.

Joshua wrote an outstanding paper on the issues of federal and state law regarding labeling of meat substitutes. The meat industry has successfully backed legislation in a number of states to tightly regulate the names and claims of meat substitute products. He explored both the First Amendment and federal preemption issues raised by this legislation. He first examined the legislation in the various states that have adopted it. He then analyzed the character of the legislation, breaking it down into various categories. Only after carefully laying this groundwork did he proceed to examine the First Amendment and preemption issues, showing how they vary depending on the precise character of the legislation. The work was of the highest quality. I awarded a well-deserved A+.

The paper shows that Joshua is an incredibly skillful and dedicated researcher. It also shows that he can organize highly complex materials in a cogent structure, analyze the issues presented in a highly sophisticated way, and write a splendid paper that presents the issues and his conclusions in a clear and persuasive fashion.

His abilities are confirmed by his record, though he was off to a slow start in law school. He is dedicated to the legal profession and wants to bring his high skills to its service. Personally, Joshua is a highly congenial young man. He would be an outstanding member of your chambers. Accordingly, I recommend him enthusiastically and without reservation.

Sincerely,

Richard B. Stewart

Writing Sample:

Simulation brief for the "Federal Courts and the Appellate Process" seminar, based on a fictionalized fact pattern.

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 17, 2020

No. 18-5218

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

PLANNED PARENTHOOD OF WISCONSIN, et al.,

Plaintiffs-Appellants

v.

ALEX M. AZAR II, in his official capacity as
United States Secretary of Health and Human Services, et al.,
Defendants-Appellees

On Appeal from the
United States District Court for the District of Columbia

PLAINTIFFS-APPELLANTS' BRIEF

October 26, 2020

[OMITTED]
Joshua Pitkoff
Counsel for Appellants

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ISSUES PRESENTED FOR REVIEW

1-3. [OMITTED]

4. Whether HHS’s addition of new scoring criteria was “arbitrary, capricious, [and] not in accordance with law” under 5 U.S.C. § 706(2)(A) for failing to state a reason for the modification or because the criteria are contrary to Title X and HHS’s regulations.

5. Whether HHS was required to use notice-and-comment rulemaking procedures under 5 U.S.C. § 553(b) when it issued new criteria that imposed substantive requirements on grantees and that substantively revised the criteria that were formerly issued via notice-and-comment rulemaking.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in the Addendum to this brief.

STATEMENT OF THE CASE

Title X of the Public Health Service Act authorizes the Secretary of HHS (“HHS”) to “make grants [. . .] to assist in the establishment and operation of voluntary family planning projects.” 42 U.S.C. § 300(a) *et seq* (1970) (hereinafter, “Title X”). Specifically, the grants are to be distributed “with such regulations as the Secretary shall promulgate,” *id.* § 300a-4(a), but are constrained by various statutory factors and requirements. *See id.* § 300(b). For example, Title X requires that the acceptance of family planning services from a Title X grantee “shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service.” *Id.* § 300a-5.

In 1971, HHS promulgated regulations via notice-and-comment rulemaking that established seven criteria to be used in evaluating grant applications. *See* 36 Fed. Reg. 18,465

(Sept. 15, 1971) (formerly 42 C.F.R. § 59.6(a)). Those applications are submitted according to each year's Funding Opportunity Announcement ("FOA"), which sets forth application procedures and, notably, includes a list of criteria that HHS will use in evaluating the applications. *See, e.g.*, Fiscal Year 2018 Funding Opportunity Announcement at 43-44, Joint Appendix ("J.A.") 93-94 ("2018 FOA"). For the nearly fifty years since 1971, each FOA has consistently applied the same evaluation criteria set out by the regulations. Declaration of Kathleen Desilets ("Desilets Decl.") at 8, J.A. 798.

The 2018 FOA broke with this longstanding practice. Without notice-and-comment procedures, HHS revised the scoring criteria to allocate 25 out of the 100 available points to the newly added Criterion (h): "The degree to which the project plan adequately provides for the effective and efficient implementation of the requirements set forth in the [FOA's] priorities and key issues." FOA at 44, J.A. 94. Criterion (e) allocates an additional 10 points based on the ability of the applicant to carry out the FOA's "priorities and key issues." Whereas prior years' FOAs included "Program Priorities" and "Key Issues" similar to those in the 2018 FOA, they "were never, and could not be scored" by the objective review panels. Desilets Decl. at 14, J.A. 799.

Therefore, under the 2018 FOA, over one third of the total points available depend on applicants' compliance with "Key Issues," such as placing a "meaningful emphasis on [...] the benefits of avoiding sexual risk" and implementing "activities for adolescents that do not normalize sexual risk behaviors, but instead clearly communicate the research informed benefits of delaying sex." 2018 FOA at 11, J.A. 61. As described by a former Regional Program Consultant for HHS, "scoring often is high" and "a difference of 4 or 5 points between applications is a significant differential." Desilets Decl. at 5, J.A. 800.

HHS adjusted the timing of applications to ensure that these new criteria were applied to all grantees. Formerly, grants were often issued in three-year cycles, but the 2017 grants were all issued for only one year, so that all program grantees would be subject to the 2018 FOA revisions and required to reapply. Declaration of Clare Coleman (“Coleman Decl.”) at 60-62, J.A. 223-34. Following the objective scoring based on these criteria, the Deputy Assistant Secretary for Population Affairs (DASPA) is formally responsible for finalizing the award, though, in the Regional Program Consultant’s experience, “no HHS administrator, including RHA or the DASPA, overrode the scoring.” Desilets Decl. at 25, J.A. 803. Instead, it is her “unwavering experience” over 25 years “that the panel scores determine the outcome.” *Id.* at 8, J.A. 978. Once a grant is awarded, the funds may be “expended solely for the purpose for which the funds were granted in accordance with the approved application.” 42 C.F.R. § 59.9 (2016). Accordingly, HHS can bring enforcement actions to revoke a grant or impose civil or criminal liabilities on a grantee based on non-compliance with the requirements in the scoring criteria. *See* HHS Grants Policy Statement (2007) at 299.

In May 2018, Plaintiff-Appellants Planned Parenthood of Wisconsin, Inc. et al., filed a lawsuit seeking injunctive and declaratory relief under the APA and the Declaratory Judgment Act. Plaintiffs moved for a preliminary injunction, and the Government moved for dismissal or summary judgment. The District Court consolidated Plaintiffs’ Motion for a Preliminary Injunction with the merits and to construe the parties’ cross motions as motions for summary judgment. On July 16, 2018, the District Court delivered the order in the underlying case, granting summary judgment to Defendants. Plaintiffs subsequently filed this appeal in August 2018. Shortly after, HHS filed a letter with this court noting that HHS has recently disbursed the 2018 grants, including to Appellants, and that it plans to keep the additional factors in the 2019 FOA scoring

criteria, albeit with a slightly lower weighting. Letter from Charles Jones, Appellees’ Counsel, to Court (Aug. 31, 2018) (“August 2018 Letter”).

SUMMARY OF ARGUMENT

I-III. [OMITTED]

IV. In promulgating the 2018 FOA’s new criteria, HHS failed to satisfy the core tenant of agency practice: agencies must give adequate reasons for their decisions. This failure is all the more striking because HHS was not just introducing the new criteria on a blank slate, but breaking with many decades of consistently applying the criteria set forth in 42 C.F.R. § 59.7(a). Because of this change in practice, HHS was required to both “display awareness” of the change and “show there are good reasons” for it. *F.C.C. v. Fox Television Studios*, 556 U.S. 502, 515 (2009). But it failed to meet even these minimum requirements, and its action is therefore arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A).

Moreover, adding the new criteria was “arbitrary, capricious, [and] not in accordance with law” because the criteria are contrary to both Title X and HHS’s own regulations. *Id.* In incorporating the FOA’s “Program Priorities” and “Key Issues” as “requirements” in the scoring criteria, HHS has, in effect, imposed its own favored methods of family planning on both grantees and patients. FOA at 43, J.A. 93. These agency-favored methods include the requirements to emphasize sexual risk avoidance, communicate the benefits of delaying sex, and avoid normalizing sexual risk behaviors. FOA at 11, J.A. 61. But these requirements plainly violate Title X’s explicit demand that all services and information be provided to patients “voluntarily.” 42 U.S.C. § 300a-5. A grantee cannot simultaneously respect the individual’s voluntary consent, as required by Title X, while also abiding by the FOA’s requirement to communicate agency-favored methods. Moreover, as a factual matter, it is disputed whether sexual risk avoidance methods are “effective,” as required by Title X. Finally, HHS violated the APA by failing to comply with its own

regulations. These regulations clearly state and answer the question, “What criteria will [HHS] use” to evaluate projects? 42 C.F.R. § 59.7(a). For nearly 50 years, an applicant would find materially the same answer to that question in both the regulation and the FOA. However, the 2018 FOA’s new criteria both diverge in substance from those listed in § 59.7(a), as well as undermine its requirements under § 59.5 to provide services “solely on a voluntary basis.” As such, the new criteria are “arbitrary, capricious, [and] not in accordance with law,” and should be vacated.

V. The FOA’s new criteria are also invalid because HHS failed to issue them through notice-and-comment rulemaking, as required by the APA. 5 U.S.C. § 553(b). The evaluation criteria were originally promulgated in 1971 through notice-and-comment processes, and have remained virtually identical since then. *Desilets Decl.* at 8, J.A. 798. As such, HHS was also required to engage in notice-and-comment processes in order to substantively revise those criteria. *See Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992). However, HHS attempted to circumvent this requirement by shoehorning their new criteria directly into the FOA without the required notice-and-comment rulemaking procedures.

The District Court erred in characterizing the new criteria under the procedural rules exception to the APA’s notice-and-comment requirements. Instead, the new criteria are properly categorized as legislative rules, and therefore require notice-and-comment, because they “creat[e] substantive requirements” for grantees. *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014). The “requirements” created by Criterion (h), FOA at 43, J.A. 93, render the revisions legislative rules, as opposed to procedural rules or general statements of policy. Therefore, they required notice-and-comment rulemaking.

ARGUMENT

I. [OMITTED]

II. [OMITTED]

III. [OMITTED]

IV. THE ADDITION OF NEW SCORING CRITERIA WAS ARBITRARY AND CAPRICIOUS BECAUSE HHS FAILED TO EXERCISE REASONED DECISIONMAKING AND THE NEW CRITERIA ARE CONTRARY TO BOTH TITLE X AND HHS'S OWN REGULATIONS

There are three independent reasons why HHS's addition of the new scoring criteria is "arbitrary, capricious, [and] not in accordance with law" under the APA. 5 U.S.C. § 706(2)(A). First, HHS departed from 47 years of precedent without giving any reasons for, or even so much as acknowledging, the change. Second, HHS's new scoring criteria, which incorporate the 2018 FOA's "Key Issues" and "Program Priorities," impose requirements that are contrary to Title X. Finally, the new scoring criteria also impose requirements that are contrary to HHS's own regulations. As such, we urge the court to reverse the District Court's summary judgment, vacate the agency's addition of criteria, and issue an injunction prohibiting their enforcement.

A. Adding the New Scoring Criteria Was Arbitrary and Capricious Because the Agency Did Not Acknowledge or Justify the Revision

By adding new scoring criteria without any semblance of justification, HHS broke with decades of established practice and violated the central touchstone of administrative law: that agencies exercise reasoned decisionmaking. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."). In the entirety of the 2018 FOA, there is not a single mention of the rationale for adding the new scoring criteria.

HHS's lack of reasoned decisionmaking is particularly problematic here because the 2018 FOA additions represent a change in its longstanding practice. This court has long recognized that

“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” *Greater Bos. Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970). This standard requires, at the very least, that an agency “display awareness that it is changing position” and “show there are good reasons for the new policy.” *F.C.C. v. Fox Television Studios*, 556 U.S. 502, 515 (2009). Neither of these requirements have been met here. It is uncontested by the parties that for the past 47 years, the relevant Title X grants were assessed based on the same seven criteria derived from the Agency’s regulations. 42 C.F.R. § 59.7(a); Desilets Decl. at 8, J.A. 978; Coleman Decl. at 56, J.A. 222. But without any acknowledgement or stated reason, HHS revised those criteria and imposed new requirements on applicants.

The District Court’s implication that the new criteria do not represent any divergence from longstanding agency policy rests on a fundamental misunderstanding of the issues presented. *See Planned Parenthood*, 316 F. Supp. 3d at 306. It is true that various prior FOAs included “Program Priorities” and “Key Issues” that bear some resemblance to those in the 2018 FOA. *See id.* However, not a single prior FOA incorporated those Priorities or Issues into the scoring criteria for awarding grants. Coleman Decl. at 59, J.A. 223. “They have never previously been a part of the application scoring, added any new grant decision-making criteria, or been designated as additional requirements for Title X projects.” *Id.* Instead, those Priorities and Issues were merely “‘add on’ ideas or matters of emphasis.” *Id.* Critically, it is the incorporation of these Priorities and Issues into the new criteria that represents the key break from prior HHS practice, and that requires acknowledgment and reasoned decisionmaking.

The requirement of reasoned decisionmaking applies widely, including to situations where, as here, the agency’s action does not necessarily involve a formal record. An agency must still

offer reasoned explanations when it “decides to depart from decades-long past practices and official policies.” *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). In *American Wild Horse*, this court vacated the Forest Service’s 2013 revision to the boundaries of the Devil’s Garden Wild Horse Territory, which broke with “twenty years” of consistent policy. Similar to HHS here, the Forest Service failed “even to acknowledge its past practice and formal policies[,] [. . .] let alone to explain its reversal of course in the 2013 decision.” *Id.* at 927. Accordingly, its Territory boundaries revision was held arbitrary and capricious. *Id.* See also *Great Lakes Gas Transmission Ltd. P’ship v. FERC*, 984 F.2d 426, 433 (D.C. Cir. 1993) (“A full and rational explanation is especially important to this court when the condition imposed reflects a shift in [the agency’s] policy or a departure from its typical manner of granting certificates and imposing conditions.”). HHS’s failure to comply with such minimal requirements is reason alone to find the action arbitrary and capricious, and grant the Plaintiff’s requested declaratory and injunctive relief.

B. Adding the New Scoring Criteria Was Arbitrary and Capricious Because the Criteria Impose Requirements that are Contrary to Title X

The newly added scoring criteria render the 2018 FOA “arbitrary, capricious, [and] not in accordance with law” because they impose requirements that are contrary to those of Title X. 5 U.S.C. § 706(2)(A). See, e.g., *Delta Air Lines, Inc. v. Exp.-Imp. Bank of the U.S.*, 718 F.3d 974, 977-78 (D.C. Cir. 2013) (finding the agency’s action arbitrary and capricious for failing to comply with statutorily imposed requirements); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Specifically, in incorporating the FOA’s “Program Priorities” and “Key Issues” into scoring Criteria (e) and (h), 2018 FOA at 43, J.A. 93, HHS has determined that applicants must be evaluated based on their “meaningful emphasis on education and counseling that communicates [. . .] the benefits of avoiding sexual risk or returning to a

sexually risk-free status.” 2018 FOA at 11, J.A. 61. In addition, applicants are also to be evaluated based on their effort to “clearly communicate” the “benefits of delaying sex” and avoid “normaliz[ing] sexual risk behaviors” for adolescents. *Id.* For the three reasons discussed below, these requirements are not in accordance with Title X’s required factors.

The District Court mistakenly implies that the 2018 FOA’s new criteria do not actually impose any requirements on grant applicants. *See Planned Parenthood*, 316 F. Supp. 3d at 310. But drawing a hard distinction between scoring criteria and requirements is an illusory misdirection. In the 2018 FOA’s own words, these are “requirements”: Criterion (h) allocates a full 25 points based on whether the applicant’s plan provides for “the implementation of *requirements* set forth in the priorities and key issues.” 2018 FOA at 44, J.A. 94 (emphasis added). Moreover, if the language itself was insufficient, consider the practical impact of these new criteria. Combined, Criteria (e) and (h) award 35 points—over one third of the total points available—based on whether an applicant satisfies the “Program Priorities” and “Key Issue” requirements. *Id.* For context, just Criterion (h)’s 25-point allocation alone is more than double every other criterion except one, *id.* at 43-44, and since at least 2001, no single criterion was worth more than 20 points. Coleman Decl. at 57, J.A. 222. Even more importantly, 35 points is an enormous sum in the context of the high scores achieved by most grant applicants in an incredibly competitive process. *Id.* at 48, J.A. 219. As we all surely remember from our first year as law students, when tests are graded on a “harsh curve,” very small point differences can have overwhelmingly large effects on the final outcome. This same “harsh curve effect” applies here, where “scoring often is high” and “a difference of 4 or 5 points is a significant differential” that could affect the outcome. Desilets Decl. at 5, J.A. 800. Finally, as discussed above, HHS is able to revoke grants, refuse to recertify grants in future years, and bring enforcement action for non-

compliance with these criteria. *See* Section II.A. Therefore, due to the FOA’s own language, the sheer magnitude of the new criteria’s impact, and the threat of enforcement, a grant applicant simply has no choice but to abide by these “requirements.”

For the following three reasons, the new requirements to emphasize particular methods of family planning are contrary to HHS’s statutorily required factors under Title X and render the 2018 FOA “arbitrary, capricious, [. . .] and otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

First, the “meaningful emphasis” on “avoiding sexual risk” is contrary to Title X’s requirement that a patient’s acceptance of any grantee’s services be entirely “voluntary” and not “a prerequisite to eligibility for or receipt of any other service.” 42 U.S.C. § 300a-5. Under Title X, it is critically important that all services and information provided to patients are accepted voluntarily, and that the receipt of any services or information “not be a prerequisite” for other services. *Id.* To put a finer point on it, “requiring a sexually active, unmarried patient who is seeking a contraceptive device to first sit through counseling on the benefits of abstaining from sexual activity” would be prohibited by the statute. *See* Coleman Decl. at 85, J.A. 231. But this sort of “meaningful emphasis” on a particular method of family planning is precisely what the 2018 FOA requires. A grantee cannot comply with both the FOA’s requirement to place a “meaningful emphasis” on or “clearly communicate” certain information, and the statute’s requirement that information only be shared voluntarily, especially when natural family planning methods are “chosen by less than 0.5% of users.” Coleman Decl. at 71, J.A. 226.

Second, the emphasis on avoiding sexual risk is contrary to Title X’s requirement that informational materials be “suitable [. . .] for the population or community to which they are made available, taking into account the educational and cultural backgrounds of the individuals.” 42

Applicant Details

First Name **Paige**
 Last Name **Sferrazza**
 Citizenship Status **U. S. Citizen**
 Email Address paigesferrazza@gmail.com
 Address

Address**Street****5-49 Borden Ave., Apt. 6N****City****Long Island City****State/Territory****New York****Zip****11101****Country****United States**

Contact Phone
 Number **6316973937**

Applicant Education

BA/BS From **University of North Carolina-Chapel Hill**
 Date of BA/BS **May 2015**
 JD/LLB From **St. John's University School of Law**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=23311&yr=2010
 Date of JD/LLB **May 15, 2022**
 Class Rank **5%**
 Law Review/
 Journal **Yes**
 Journal(s) **St. John's Law Review**
 Moot Court
 Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

McGuinness, Margaret
mcguinnm@stjohns.edu

Duryea, Catherine
duryeac@stjohns.edu
4107467606

Klonick, Kate
klonickk@stjohns.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

PAIGE SFERRAZZA

5-49 Borden Ave., Apt. 6N, Long Island City, NY 11101 • (631) 697-3937 • paigesferrazza@gmail.com

January 19, 2022

The Honorable Eric N. Vitaliano
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Vitaliano,

I am a third-year student at St. John's University School of Law, currently ranked first in my class. I am writing to apply for a clerkship in your chambers. I am confident that my academic studies, prior work experience, determined work ethic, and excellent communication skills, plus my strong legal research, analysis, and writing skills, would serve me very well in this position. Moreover, I very much would like to perform this public service to the legal system and obtain the special education and training of being a federal law clerk.

At St. John's, I am an Articles Editor on the *St. John's Law Review*. I am also the only International Honors Scholar in my class and a student fellow in the Center for International and Comparative Law. During my 1L year, I was selected as a Federal Scholar in recognition of my academic achievement and my summer internship placement (with then-Chief Judge McMahon in the SDNY).

I am confident that my prior experiences, particularly as a 2021 summer associate at Debevoise and Plimpton, LLP, have prepared me to succeed as a clerk in your chambers. At D&P, I strengthened my legal research and writing skills while preparing memos, drafting sections of briefs, and finalizing documents in a range of matters for the international disputes, environmental, social and governance, white collar, and commercial litigation groups. These experiences built on the research and writing foundation I previously gained while interning for Chief Judge, where my assignments included synthesizing relevant law and procedural rules, navigating choice of law issues, interpreting contracts, and gaining exposure to federal litigation.

Prior to law school, I developed exceptional problem solving and cross-cultural skills while serving in the Peace Corps in Mozambique. Teaching in a rural school and working closely with Mozambican youth group leaders to organize conventions in Portuguese allowed me to frequently collaborate with others in a multicultural environment while building community. Importantly, I learned to tackle any challenge with tenacity, resourcefulness, and creativity while reconciling competing interests across cultural boundaries in extremely sensitive situations.

I have enclosed my resume, a writing sample, a self-prepared unofficial transcript, and my official undergraduate transcript for your review.

I hope to have the opportunity to meet with you to discuss my background, interest, and qualifications. Thank you for your consideration.

Sincerely,

Paige Sferrazza

PAIGE SFERRAZZA

5-49 Borden Avenue, Apt. 6N, Long Island City, NY 11101 ■ (631) 697-3937 ■ paigesferrazza@gmail.com

EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, New York

J.D. Candidate, June 2022

Academics: G.P.A.: 3.94; Rank: 1 / 241

Honors: *Articles Editor, Diversity and Inclusion Committee, Holistic Review Committee*, St. John's Law Review; St. Thomas More Scholar (full tuition); International Honors Program Scholar; 2020 Federal Scholar's Award Recipient; *Fellow*, Center for International and Comparative Law

Activities: *Teaching Fellow*: Advanced Legal Research, Fall 2021; Transnational Legal Skills, Fall 2021; Property, Spring 2021; *Member*, International Law Association; Women's Law Society; Multilingual Advocates

UNIVERSITY OF NORTH CAROLINA, Chapel Hill, North Carolina

B.A., with Distinction, Public Policy with International concentration; minor in Public Relations: May 2015

Academics: G.P.A.: 3.74 (cumulative); G.P.A.: 3.87 (major)

Honors: Buckley Public Service Scholar; Bryan Social Innovation Fellow; President's Volunteer Service Award

Study Abroad: Boston University, Sydney, Australia (Spring 2014)

LEGAL EXPERIENCE

DEBEVOISE & PLIMPTON LLP, New York, New York

Summer Associate, May 2021 – July 2021

- Conducted legal research, drafted memos, drafted sections of briefs, and finalized documents for commercial litigation, white collar, environmental social governance, public international law, and international arbitration matters.

HONORABLE COLLEEN MCMAHON, CHIEF JUDGE,

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, New York, New York

Summer Law Clerk, June 2020 – July 2020

- Conducted legal research and prepared draft decisions for the Chief Judge to review.
- Attended remote trials, pre-trial conferences, and Chambers meetings with clerks and staff.

MATTHEW CHARLES LAW, Chapel Hill, North Carolina

Legal Assistant, August 2012 – May 2015

- Communicated time-sensitive information to potential and existing clients, maintained client files, and recorded payments.
- Prepared correspondence to clients, Clerks of Superior Court, insurance companies, government entities, and law offices.

PUBLIC SERVICE / INTERNATIONAL EXPERIENCE

UNITED NATIONS JOINT SUSTAINABLE DEVELOPMENT GOALS FUND, New York, New York

Legal and Policy Intern, January 2021 – April 2021

- Drafted advocacy briefs to send to heads of states, Permanent Representatives, donors, and other stakeholders.
- Researched official development and legal frameworks of donor and partner states for meetings with Permanent Missions.
- Created partnership pitch strategies by aligning public and private donor priorities with Joint SDG Fund projects and goals.

PEACE CORPS, Namacurra, Mozambique

Secondary School English Teacher, August 2016 – November 2018

- Taught English at low-resource rural school with self-created curriculum to 700+ students.
- Collaborated with community to open and manage Namacurra's first library and host childhood literacy classes.

REDES (GIRLS IN DEVELOPMENT, EDUCATION AND HEALTH translated from Portuguese), Zambézia, Mozambique

Provincial Program Coordinator, December 2016 – July 2018

- Organized and facilitated advisor trainings and student workshops. Taught participants about education and public health.
- Collected monthly statistics and co-wrote grant applications for over fifty REDES groups province wide.

GOOD CORPS SOCIAL IMPACT CONSULTANCY, New York, New York

Team Coordinator / Junior Strategist, October 2015 – July 2016

- Conducted qualitative research, provided client support, and engaged in project coordination to align business objectives with corporate social responsibility goals for DICK'S Sporting Goods "Sports Matter" campaign.
- Designed and managed recruitment process resulting in two new hires.

PUBLICATIONS

Still Separate, Still Unequal: Promoting Racial Equity in Public Schools in the United States and South Africa, 95.4 ST. JOHN'S L. REV. __ (2022).

SKILLS AND INTERESTS

Professional working proficiency in Portuguese; Intermediate proficiency in Spanish. Certified Yoga Instructor. Global Travel (traveled to 41 countries, often solo). Adept in Adobe Acrobat, Microsoft Office, and G Suite.

Unofficial and Self-Prepared Transcript
St John's University School of Law

NAME: Paige Sferrazza
ADDRESS: 5-49 Borden Avenue, Apt. 6N
CITY: Long Island City STATE: New York ZIP: 11101
TELEPHONE NUMBER: (631) 697-3937
EMAIL: paigesferrazza@gmail.com

EXPECTED DATE OF GRADUATION: SPRING 2022

CURRENT PROGRAM: X DAY ___ PART-TIME

Semester: Fall

Year: 2019

Course:

Civil Procedure (4.00)	A
Constitutional Law I (2.00)	A-
Contracts I (3.00)	A-
Legal Writing (2.00)	A
Torts (4.00)	A
Introduction to Law (2.00)	CR
Professional Development (0.00)	CR
Semester GPA:	3.9
Total Credits:	16

Semester: Spring

Year: 2019

Course:

Lawyering (2.00)	A
Constitutional Law II (3.00)	CR
Contracts II (2.00)	CR
Criminal Law (3.00)	CR
Legal Writing II (2.00)	CR
Property (4.00)	CR
Professional Development (0.00)	CR
Semester GPA:	4.0
Total Credits:	33

Semester: Fall

Year: 2020

Course:

Business Organizations (4.00)	A
Directed Research (2.00)	A
International Law (3.00)	A+
International and Foreign Legal Research (2.00)	A+

Professional Responsibility (3.00)	B+
Semester GPA:	3.96
Total Credits:	47

Semester: Spring
Year: 2021
Course:

Advanced Legal Research (2.00)	A
Drafting: Litigation and Contracts (3.00)	A
Evidence (4.00)	A+
International Commercial Arbitration (2.00)	A
Transnational Employment Relations (2.00)	A
Semester GPA:	4.09
Total Credits:	60

Semester: Fall
Year: 2021
Course:

Advanced Interviewing and Counseling (2.00)	A
Criminal Procedure: Adjudication (2.00)	A
Real Estate Transactions (3.00)	A+
Transactions in Emerging Markets (2.00)	A-
Trusts and Estates (4.00)	B+
Semester GPA:	3.81
Total Credits:	73

Semester: Spring
Year: 2022
Course:

Administrative Law (3.00)	Pending
Business Basics (1.00)	Pending
Colloquium in International Law (2.00)	Pending
International Human Rights Law (3.00)	Pending
St. John's Law Review (4.00)	Pending
Tenants' Rights Advocacy Clinic (4.00)	Pending
Semester GPA:	Pending
Total Credits:	90

OVERALL GPA: **3.94**

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Official Academic Transcript of:

PAIGE SFERRAZZA
Transcript Created: 5-Sep-2018

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Intended Recipient:

PAIGE SFERRAZZA
15 BEAVER HILL LANE
HUNTINGTON, NY 11743-5701

E-Mail: paige.sf@gmail.com

Requested by:

PAIGE SFERRAZZA
15 BEAVER HILL LANE
HUNTINGTON, NY 11743-5701

E-Mail: paige.sf@gmail.com

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University Registrar

RAISED SEAL NOT REQUIRED

Name: Sferrazza, Paige
Student ID: 720188364

Birthdate: 01/30/1993
Print Date: 09/05/2018

Program: AS Bachelor
Active in Program
05/15/2012:

College of Arts and Sciences
Journalism and Mass Communication Major
Journalism & Mass Communication: Reporting Option
Global Studies Second Major

05/15/2012:

Global Studies: International Politics and Western
European or European Union Studies Option

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 05/10/2015
Degree Honors: Distinction
Major: College of Arts and Sciences
Public Policy

Minor: Journalism & Mass Communication

Sub-Plan: Minor: Journalism & Mass Communication Minor: Public Relations

Program: SJ Bach Arts Journ Mass Comm
Active in Program
01/09/2013:

School of Journalism and Mass Communication
Journalism and Mass Communication Major
Journalism & Mass Communication: Reporting Option
Global Studies Second Major

01/09/2013:

Global Studies: International Politics and Western
European or European Union Studies Option

Test Credits

Test Credits Applied Toward AS Bachelor

2011 Fall

Course	Description	Earned
BIOL 101	PRINCIPLES OF BIOL	3.000
BIOL 101L	INTRO BIOLOGY LAB	1.000
BIOL 279	ORGANISMAL BIOL TOP	3.000
BIOL 279L	ORGANISMAL BIOL LAB	1.000
ENGL 190	INTRO TO LIT STUDIES	3.000
ENGL 101	ENG COMP & RHETORIC	3.000
ENGL 101	ENG COMP & RHETORIC	0.000
ENGL 102	ENG COMP & RHETORIC	3.000
HIST 128	AM HIST SINCE 1865	3.000
HIST ----	HIST GENERAL ELECTIVE	3.000
MATH 231	CALC FUNC ONE VAR I	3.000
MATH 110P	ALGEBRA	0.000
POLI 100	INTRO TO GOVT IN US	3.000
PSYC 101	GENERAL PSYCHOLOGY	3.000

Test Transfer Totals: 32.000

Program: SJ Bach Arts Journ Mass Comm
Active in Program
01/14/2013:

School of Journalism and Mass Communication
Journalism and Mass Communication Major
Journalism & Mass Communication: Electronic
Communication Option
Global Studies Second Major

01/14/2013:

Global Studies: International Politics and Western
European or European Union Studies Option

Program: SJ Bach Arts Journ Mass Comm
Active in Program
03/26/2013:

School of Journalism and Mass Communication
Journalism and Mass Communication Major
Journalism & Mass Communication: Electronic
Communication Option
Public Policy Second Major

03/26/2013:

Program: SJ Bach Arts Journ Mass Comm
Active in Program
09/19/2013:

School of Journalism and Mass Communication
Journalism and Mass Communication Major
Journalism & Mass Communication: Broadcast and
Electronic Journalism Option
Public Policy Second Major

09/19/2013:

Academic Program History

Program: AS Bachelor
05/26/2011: Active in Program
05/26/2011: College of Arts and Sciences
International Studies Major

Program: AS Bachelor
08/23/2011: Active in Program
08/23/2011: College of Arts and Sciences
Global Studies Major

Program: AS Bachelor of Arts
05/15/2012: Active in Program
05/15/2012: College of Arts and Sciences
Global Studies Major

Program: SJ Bach Arts Journ Mass Comm
Active in Program
10/28/2013:

School of Journalism and Mass Communication
Journalism and Mass Communication Major
Journalism & Mass Communication: Public Relations
Option
Public Policy Second Major

10/28/2013:

Program: AS Bachelor of Arts
08/15/2014: Active in Program

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL



Paige Sferrazza
University Registrar

RAISED SEAL NOT REQUIRED

Name: Sferrazza, Paige
Student ID: 720188364

08/15/2014: College of Arts and Sciences
Public Policy Major

Cumulative GPA 3.723 Cum Totals 40.000 72.000 40.000 148.900

Program: AS Bachelor of Arts
08/15/2014: Active in Program

Term Honor: Dean's List

08/15/2014: College of Arts and Sciences
Public Policy Major

Academic Standing Effective 12/14/2012: Good Standing

08/15/2014: Journalism & Mass Communication Minor

2013 Spring

Journalism & Mass Communication Minor: Public
Relations Minor

Beginning of Undergraduate Record

2011 Fall

Course	Description	Attempted	Earned	Grade	Points
ECON 101	ECON: INTRO	3.000	3.000	B	9.000
PHIL 160	INTRODUCTION ETHICS	3.000	3.000	B+	9.900
POLI 150	INTERN REL WRLD POL	3.000	3.000	A	12.000
STOR 155	INTRO STATISTICS	3.000	3.000	B+	9.900

Course	Description	Attempted	Earned	Grade	Points
GLBL 393	GREAT DECISIONS	1.000	1.000	PS	0.000
HIST 577	US FOR REL 20TH C	3.000	3.000	B+	9.900
ITAL 203	INTMED ITAL I	3.000	3.000	A	12.000
JOMC 340	INTRO MASS COMM LAW	3.000	3.000	B+	9.900
POLI 101	STATE GOVT IN US	3.000	3.000	B	9.000

Course	Description	Attempted	Earned	Grade	Points
Term GPA	3.400 Term Totals	12.000	12.000	12.000	40.800

Course	Description	Attempted	Earned	Grade	Points
Term GPA	3.400 Term Totals	13.000	13.000	12.000	40.800

Course	Description	Attempted	Earned	Grade	Points
Cumulative GPA	3.400 Cum Totals	12.000	44.000	12.000	40.800

Course	Description	Attempted	Earned	Grade	Points
Cumulative GPA	3.648 Cum Totals	53.000	85.000	52.000	189.700

Academic Standing Effective 12/16/2011: Good Standing

Academic Standing Effective 05/07/2013: Good Standing

2012 Spring

Course	Description	Attempted	Earned	Grade	Points
AMST 203	APPR AMER INDIAN STUDIES	3.000	3.000	A	12.000
ANTH 59	FYS: RIGHT TO CHILDHOOD	3.000	3.000	A	12.000
JOMC 137	PRINCIPLES OF AD/PR	3.000	3.000	A-	11.100
LFIT 104	LIFE FITNESS: EX & COND	1.000	1.000	A	4.000
RELI 180	INTRO ISLAM CIV M/E	3.000	3.000	A	12.000

Course	Description	Attempted	Earned	Grade	Points
JOMC 221	AUDIO-VIDEO INFORMATION	3.000	3.000	A-	11.100
JOMC 232	P R WRITING	3.000	3.000	A	12.000
JOMC 490	SPCL TOPS IN MASS COMM	3.000	3.000	A	12.000
Course Topic: New Media Technologies					
PLCY 220	POLITICS/PUBLIC POLICY	3.000	3.000	A	12.000
PLCY 340	JUSTICE IN PUBLIC POLICY	3.000	3.000	A-	11.100

Course	Description	Attempted	Earned	Grade	Points
Term GPA	3.931 Term Totals	13.000	13.000	13.000	51.100

Course	Description	Attempted	Earned	Grade	Points
Term GPA	3.880 Term Totals	15.000	15.000	15.000	58.200

Course	Description	Attempted	Earned	Grade	Points
Cumulative GPA	3.676 Cum Totals	25.000	57.000	25.000	91.900

Course	Description	Attempted	Earned	Grade	Points
Cumulative GPA	3.700 Cum Totals	68.000	100.000	67.000	247.900

Term Honor: Dean's List

Term Honor: Dean's List

Academic Standing Effective 05/04/2012: Good Standing

Academic Standing Effective 12/13/2013: Good Standing

2012 Fall

Course	Description	Attempted	Earned	Grade	Points
ECON 310	APPLIED MICRO	3.000	3.000	A	12.000
JOMC 141	PROF PROBS & ETHICS	3.000	3.000	A	12.000
JOMC 153	NEWS WRITING	3.000	3.000	B	9.000
PLCY 210	POLICY INNOV & ANALYSIS	3.000	3.000	A	12.000
SPAN 101	ELEMENTARY SPANISH	3.000	3.000	A	12.000

Course	Description	Attempted	Earned	Grade	Points
TREQ 289	ELECTIVE	4.000	4.000	PS	0.000
TREQ 289	ELECTIVE	4.000	4.000	PS	0.000
TREQ 289	ELECTIVE	4.000	4.000	PS	0.000
TREQ 289	ELECTIVE	4.000	4.000	PS	0.000
YAP 463	STDY IN AUSTRALIA	0.000	0.000	NR	0.000

Course	Description	Attempted	Earned	Grade	Points
Term GPA	3.800 Term Totals	15.000	15.000	15.000	57.000

Course	Description	Attempted	Earned	Grade	Points
Term GPA	0.000 Term Totals	16.000	16.000	0.000	0.000

Course	Description	Attempted	Earned	Grade	Points
Cumulative GPA	3.700 Cum Totals	84.000	116.000	67.000	247.900

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL



[Signature]
University Registrar

RAISED SEAL NOT REQUIRED

Name: Sferrazza, Paige
Student ID: 720188364

Academic Standing Effective 05/06/2014: Good Standing

2014 Fall

Course	Description	Attempted	Earned	Grade	Points
JOMC 434	PUB REL CAMPAIGNS	3.000	3.000	A	12.000
MUSC 141	WEST MUSC SURVEY	3.000	3.000	A	12.000
PLCY 460	QUAN ANALYSIS PUBLIC POLICY	4.000	4.000	A-	14.800
PLCY 681	RESEARCH DESIGN	3.000	3.000	A-	11.100
		Attempted	Earned	GPA Units	Points
Term GPA	3.838 Term Totals	13.000	13.000	13.000	49.900
Cumulative GPA	3.723 Cum Totals	97.000	129.000	80.000	297.800
Term Honor:	Dean's List				

Academic Standing Effective 12/12/2014: Good Standing

2015 Spring

Course	Description	Attempted	Earned	Grade	Points
JOMC 393	MASS COMMUNICATION PRACTICUM	1.000	1.000	PS	0.000
JOMC 474	THE BRANDING OF ME	3.000	3.000	A	12.000
PLCY 698	CAPSTONE IN PUBLIC POLICY	3.000	3.000	A	12.000
		Attempted	Earned	GPA Units	Points
Term GPA	4.000 Term Totals	7.000	7.000	6.000	24.000
Cumulative GPA	3.742 Cum Totals	104.000	136.000	86.000	321.800

Academic Standing Effective 05/05/2015: Good Standing

2015 Buckley Public Service Scholar

End of Official Undergraduate Academic Record

Document Description										
The face of this document contains information recorded by the University Registrar comprising the referenced student's academic record. Transcript explanations are shown below. For more information and clarification of historical transcripts and current records, please visit: http://registrar.unc.edu/academic-services/transcripts-certifications/transcript-key-information/										
Grading System Explanation										
Undergraduate Career			Doctor of Dental Surgery Career				Doctor of Pharmacy Career			
A (-)	Highest Level of Attainment		A	Highest Level of Attainment			A	Highest Level of Attainment		
B (+,-)	High Level of Attainment		B	High Level of Attainment			B	High Level of Attainment		
C (+,-)	Adequate Level of Attainment		C	Adequate Level of Attainment			C	Adequate Level of Attainment		
D (+)	Minimal Passing Level of Attainment		D	Minimal Passing Level of Attainment			F	Failed - Unacceptable Performance		
F	Failed - Unacceptable Performance		F	Failed - Unacceptable Performance			FA	Failed - Unacceptable Performance		
FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)		PS	Passing grade for course using Pass/Fail grading				(Absent from final exam but could not have passed even if exam had been taken)		
PS	Passing grade for course using Pass/Fail grading		The School of Medicine produces separate transcripts for students entering prior to Fall 2014 and seeking the MD degree. Expanded grade information is available at: http://www.med.unc.edu/ome/registrar/transcripts				H	Clear Excellence		
SP	Satisfactory Progress (Authorized only for first portion of Honors Program)						IP	In Progress		
							P	Entirely Satisfactory		
							PS	Passing grade for course using Pass/Fail grading		
Graduate Career							Law Career			
H	High Pass		CO	Conditional-final grade pending reexamination and/or limited additional academic work			A (+,-)	Highest Level of Attainment		
P	Pass		COF	Fail after remediation			B (+,-)	High Level of Attainment		
L	Low Pass		COP	Pass after remediation			C (+,-)	Adequate Level of Attainment		
F	Failed		F	Failed			D (+)	Minimal Passing Level of Attainment		
Graduate grades of H, P, and L should not be interpreted as equivalent to undergraduate grades of A, B, and C, do not accrue quality points, and do not generate GPA Note: Graduate students enrolled in courses numbered below 400 should receive undergraduate grades			H	Honors - Clear Excellence			F	Failed - Unacceptable Performance		
			HP	High Pass - Above Average			FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)		
			P	Pass - Entirely Satisfactory			PS	Passing grade for course using Pass/Fail grading		
Other Grade Symbols Shared Across Careers										
AB	Absent from Exam		F*	Administratively assigned after failure to convert an Incomplete (IN) or absence (AB) to a grade within the allowed time			NR	No grade reported		
BE	(By Exam) Credit by examination without enrollment in the course		IN	Work Incomplete			PL	(Placement) Credit based on an evaluation which places the student in an advanced course		
CC	(Composition Condition) May be assigned in addition to any regular grade and indicates marked deficiency in English composition		NE	No Grade Expected			W	Withdrawn without penalty		
			NG	(No Grade) No grade assigned			XF	Failure due to an honor court violation and can be changed to a grade of F if student completes prescribed steps to remediate the violation		
			Recorded for all "General Registration" (Course number 400) or Judicial Pending cases			***	(No Report) Class Roll not received			
Course Numbering System			Quality Points and Quality Point Average							
The numbers assigned to Courses are normally categorized as follows:			Quality Point Average is determined by dividing the sum of quality points by the sum of semester hours. Grades of NE, NG, NR, PS, SP, BE, PL, W, H, P and L do not generate quality points. Grades of IN and AB in the Undergraduate career (ONLY) are treated as an F.							
Effective Fall 2006	Courses Primarily For		<u>Quality point values, per semester hour, are assigned as shown below:</u>							
001 - 199	First Years and Sophomores		A+	4.30	B+	3.30	C+	2.30	D+	1.30
200 - 399	Juniors and Seniors		A	4.00	B	3.00	C	2.00	D	1.00
400 - 699	Advanced Undergraduates and Graduate Students		A-	3.70	B-	2.70	C-	1.70	F	0.00
700 - 999	Graduate Students Only							XF	0.00	
Length of the Year: The year consists of two regular semesters of approximately seventeen weeks and a summer session which is divided into two terms of approximately five and one half weeks each. Credit Hours: One semester credit is the value of each lecture hour or two to three laboratory hours per week whether or not the course was passed. Release of Information: A transcript is a confidential document that cannot be released to a third party without the written consent of the student. This is in accordance with the Family Educational Rights and Privacy Act of 1974. Academic Standing: A student is in good academic standing unless otherwise noted on the transcript. Disciplinary penalties are shown only when these are in effect at the time the transcript is issued.										
This Academic Transcript from The University of North Carolina at Chapel Hill located in Chapel Hill, NC is being provided to you by Credentials Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Credentials Inc. of Northfield, IL is acting on behalf of The University of North Carolina at Chapel Hill in facilitating the delivery of academic transcripts from The University of North Carolina at Chapel Hill to other colleges, universities and third parties using the Credentials' TranscriptsNetwork™.										
This secure transcript has been delivered electronically by Credentials Inc. in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The University of North Carolina at Chapel Hill's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the University Registrar, The University of North Carolina at Chapel Hill, CB#2100 SASB North, Chapel Hill, NC 27599-2100, Tel: (919) 962-3954.										



Margaret E. McGuinness
Professor of Law
Co-Director, Center for International
and Comparative Law

St. John's University
School of Law
8000 Utopia Parkway
Queens, NY 11439

Tel (718) 990-8018
Fax (718) 990-8300
mcguinnm@stjohns.edu

October 18, 2021

Re Paige Sferrazza

Dear Judge

I am writing to offer my enthusiastic recommendation of Paige Sferrazza for a clerkship in your chambers. Paige possesses the intellectual brilliance, academic track record, and research and writing skills necessary to succeed in a federal clerkship. She also carries with her a unique set of global professional experiences that set her apart from her peers. She is a star student. And I am confident her star will continue to rise as she enters the legal profession.

I met Paige as a prospective student in 2019 and was part of the committee that selected and recruited her for our competitive International Honors Scholar program. As a faculty advisor to that group, I got to know Paige early on, and have worked closely with her as a student fellow at the Center for International and Comparative Law (CICL), and as a teaching fellow for my Transnational LL.M class. As a student in International Law last year, Paige earned the top grade (a rare A+), which was unsurprising given her diligence and consistently impressive preparation for class. Despite being held online due to the pandemic, Paige maintained high energy and enthusiasm as she mastered the doctrinal material, which she then put to use during her summer in the international practice group at Debevoise. She is among the top 1% of students I have taught in my over sixteen years of teaching.

In addition to her legal skills, Paige is passionate about and dedicated to public service. She brings to the law the same sensibility and commitment to justice that led her to service in the Peace Corps in Mozambique and to her public service work at UNC Chapel Hill. I have seen this dedication – and truly impressive organization skills – in her service as a teaching fellow in my LL.M simulation-based experiential course in transnational practice. Paige is also a warm and friendly presence. She thrives in a diverse environment and is adept at fostering community across cultural or linguistic boundaries.

She will be a real asset to your chambers and a pleasure to have as a member of a collaborative team. I recommend her to you without reservation.

Sincerely yours,

A handwritten signature in black ink, reading "Margaret E. McGuinness".

Margaret E. McGuinness
Professor of Law
Director, LL.M. in Transnational Legal Practice Program
Co-Director, St. John's Center for International and Comparative Law



St. John's University
 School of Law
 8000 Utopia Parkway
 Queens, NY 11439

October 20, 2021

Dear Judge,

I am an Assistant Professor at St. John's School of Law, where I had the pleasure of supervising Paige Sferrazza while she wrote her student note, forthcoming in the St. John's Law Review, entitled *Separate and Unequal: Promoting Racial Equity in Public Schools in the United States and South Africa*. I am writing to enthusiastically and warmly recommend Paige for a clerkship in your chambers.

Paige is a superstar at St. John's (first in her class), and it is not hard to see why. Her note is comparative legal scholarship at its best. She dives into a rigorous analysis of South African constitutional law on the consideration of race (and language, which is closely correlated in South Africa) in educational settings. Navigating racial politics that are quite different from those in the U.S. with nuance and depth, she argues for the benefits of the race-conscious approach found in South African jurisprudence in contrast with the race-neutral approach in the U.S. Though I clerked for the Constitutional Court of South Africa and was familiar with the cases already, I learned new insights from Paige's comparative analysis. By using the South African cases as an alternative framework for evaluating American law, she brings empirical weight to familiar critiques of the move away from race-based affirmative action programs.

Paige was a dream advisee. She moved smoothly from a big-picture interest to a specific research question. Her legal research skills were superb and her writing clear and concise. She was mature, professional, and flexible throughout the difficulties of conducting research during the pandemic.

Paige has a great deal of legal and non-legal experience in research and writing, as well as data analysis and project management, often under difficult conditions. With a background in public service (Peace Corps) and marketing, she has a wealth of experience in creative approaches to quantitative and qualitative analysis. These skills would help her in a fast-paced work environment where she needs to assimilate new information quickly.

I have no doubt that she will bring excellent research and writing skills to a judicial clerkship and that she would be an asset to your team. Please don't hesitate to contact me at duryeac@stjohns.edu or 410-746-7606 if I can provide any further information.

Sincerely,

Catherine Baylin Duryea
Assistant Professor of Law

October 26, 2021

[honorable_judge_name]
[formatted_address]

Dear Judge [judge_name],

I am writing in support of the clerkship application of Paige Sferrazza, a rising third-year student here at the St. John's University School of Law where she is at the very top of her class. Paige's credentials are impeccable: she is currently ranked #1 in her class after four semesters, she is an Articles Editor at *St. John's Law Review* and the recipient of the St. Thomas More Scholarship (full tuition). She would be competitive for any clerkship in the country, but she has a special interest in clerking for in federal court in New York. I encourage you to interview her for a position as soon as you can. She is not to be missed.

Paige was a student in my property law course in the very difficult spring of 2020. Despite the circumstances, she quickly distinguished herself as a superior participant with an inquisitive mind. I require my students to do a great deal of active participation throughout the course, and encourage them to look behind the letter of the law to the theory behind it. Paige's performance in class was heads and shoulders above the rest, and while we were not allowed to grade beyond Pass/Fail for that Covid semester, I am confident from reading her writing and working with her for the last year, that she would have been among the top grades. Her writing and research skills simply shine through: she writes compelling narratives, and her analysis is crisp, grounded in the source material, and organized. Her work was so excellent I asked her to serve as my teaching assistant for the course in the spring of the next year.

Paige's performance in my course is not an outlier. As I mentioned earlier, her GPA is a 3.98, ranking her as *the best student* in her class. This is an enormous achievement. The St. John's Law School rigorously enforces a B mean in grading in all first-year courses, with very limited deviation in subsequent years. C's are rare among our talented students, so A's are very hard to come by. In addition, Paige has performed this well amidst probably the hardest two years to be a law student in history, achieving despite disruption to classes online, offline, in person, and in the middle of global uncertain many A's and A+s during law school.

Finally, Paige has a simply wonderful personality. She is probably the hardest-working student and humble student I have had the pleasure of knowing. She is kind, witty, funny, and always incredibly prepared. She would be a joy to have around chambers, and her writing and leadership skills will make her a great clerk and co-clerk.

If you have any questions or would like to discuss Paige's application, do not hesitate to call me. Paige will be truly outstanding and I hope you will give her the consideration she deserves.

Sincerely,

Kate Klonick

Assistant Professor of Law
St. John's Law School
klonickk@stjohns.edu
585-330-2126

PAIGE SFERRAZZA

5-49 Borden Avenue, Apt. 6N, Long Island City, NY 11101 ▪ (631) 697-3937 ▪ paigesferrazza@gmail.com

WRITING SAMPLE

The attached writing sample is a memo I prepared for a senior associate in the International Disputes Resolution Group during my summer internship at Debevoise and Plimpton, LLP. In it, I explore whether the conduct of a host state's judiciary in relation to a foreign investor might amount to a violation of the Fair and Equitable Treatment provision of a bilateral investment treaty when such conduct fails to rise to the level of a denial of justice claim. After presenting my findings, I include summaries of and quotes from pertinent cases as requested by the senior associate. Here, I have included four of the thirteen case overviews I originally completed.

Date: June 9, 2021

From: Paige Sferrazza

Re: FET and/or Denial of Justice Claim for Host State Judicial Conduct

QUESTION PRESENTED

Can domestic court conduct be construed as a violation of the Fair and Equitable Treatment standard (“FET”) that is different from, and does not necessarily rise to the level of, a denial of justice claim? If so, what is the threshold required to establish such a FET violation?

ANSWER

The FET standard, one of the most commonly invoked protections in international investment disputes, is included in most bilateral investment treaties (“BITs”).¹ While it has no unified definition,² many international arbitration tribunals have interpreted FET to require states “to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investor’s legitimate expectations.”³ Various situations may give rise to a FET violation, including denial of justice, denial of due process, arbitrary or discriminatory treatment, or evidence of bad faith.⁴ While state actors in any branch of government may violate the FET standard, the claim for denial of justice was developed to protect foreign investors from improper acts of a host state’s judiciary.⁵ This claim typically encompasses: “(1) a denial of access to courts; (2) excessive length of proceedings; (3) serious procedural defects in proceedings; and (4) irrational or abusive outcome going beyond mere misapplication of the law.”⁶ Because tribunals “will not act as courts of appeal” when evaluating denial of justice allegations, a high threshold applies to such claims and claimants must first exhaust all local remedies.⁷

A state may, however, be responsible for a breach of the FET standard based on the conduct of its judiciary even if that conduct does not rise to the level of denial of

¹ See Dr. Iona Knoll-Tudor & Anastasiya Ugale, *Fair and Equitable Treatment*, JUS MUNDI (Nov. 10, 2021), <https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment>.

² UNCTAD, FAIR AND EQUITABLE TREATMENT: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II xiii (2012), https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

³ *Id.*

⁴ Knoll-Tudor & Ugale, *supra* note 1.

⁵ Anže Arko & Charis Tan, Denial of Justice in FET, JUS MUNDI (Dec. 31, 2021), <https://jusmundi.com/en/document/wiki/en-denial-of-justice-in-fet>.

⁶ *Id.*

⁷ *Id.*

justice.⁸ Indeed, “the State can commit other breaches through its courts that do not amount to denial of justice and for which less stringent criteria apply.”⁹ Situations of this kind have included (1) disrespect of due process and procedural propriety,¹⁰ and (2) arbitrariness.¹¹ Unlike in a denial of justice claim, claimants bringing claims of these other breaches of FET are not required to exhaust local remedies.¹²

Tribunals have not yet affirmatively decided whether denial of justice or a separate due process claim should apply when solely assessing defects in judicial proceedings or judicial conduct.¹³ Some tribunals have analyzed court conduct exclusively through a denial of justice lens,¹⁴ or assert that due process is part and parcel of denial of justice.¹⁵ Other tribunals “have been open to find a breach of obligations

⁸ *Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, ¶ 351; *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, 12 Sept. 2013, ¶ 223 (“[I]t is evident that there are distinctions to be made between conduct that may amount to a denial (or gross denial) of justice and other conduct that may also be sufficiently egregious and shocking, such as manifest arbitrariness or blatant unfairness.”).

⁹ Gabrielle Kaufmann-Kohler & Michele Potesta, *Investor-State Dispute Settlement and National Courts* 79 (2020) (citing Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration* 28 (2018)).

¹⁰ See *Al-Bahloul v. Tajikistan*, SSC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 8 June 2010, ¶ 221; *Deutsche Bank AG v. Socialist Republic of Sri Lanka*, ICSID Case No. Arb/09/02, Award, 31 Oct. 2012, ¶ 478.

¹¹ See *Waste Management v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004, ¶ 198; *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 3 Aug. 2011, ¶ 500. See also Demirkol, *supra*, at 35–36. Demirkol suggests that the FET standard also grants protection from a third situation: “the obstruction of an investment through abusive proceedings.” However, the author cites *Swisslion v. Macedonia* and *Stati v. Kazakhstan* for support. In *Swisslion*, the acts of the executive branch, not the judiciary, triggered FET liability. *Swisslion v. Macedonia*, ICSID Case No. Arb/09/16, Award, 21 Aug. 2009, ¶¶ 299–300. The *Stati* dispute was based on the misconduct of Kazakh agencies, not the judiciary. Demirkol, *supra*, at 36.

¹² Kaufmann, *supra*, at 79 (citing *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 181).

¹³ Various human rights treaties protect due process or fair trial as a fundamental human right. See *Universal Declaration of Human Rights*, art. 10, GA Res. 217A (III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; *International Covenant on Civil and Political Rights*, art. 14(1), 19 Dec. 1996, 999 U.N.T.S. 171, (entered into force 23 March 1976). Berk Demirkol suggests that “the wide recognition of this right may suggest that it has gained customary international law character.” BERK DEMIRKOL, *JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION* 196 (Lorand Bartel et al. eds., 2018). It follows that “the disrespect of due process rights would give rise to a breach of a customary international law obligation, or, at least, of the fair and equitable treatment standard.” *Id.*

¹⁴ See *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶¶ 96, 136 (evaluating court conduct exclusively through a denial of justice analysis and failing to find a denial of justice); *accord Waste Management Award*, ¶¶ 123–32.

¹⁵ See *Manchester Securities v. Poland*, PCA Case No. 2015-18, Award, 9 Mar. 2015, ¶¶ 407–09 (citing *Swisslion v. Macedonia*, ICSID Case No. ARB/09/16, Award, July 6 2012, ¶ 262; *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, May 27, 2004, ¶ 188; *Oostergetel v. The Slovak Republic*, UNCITRAL, Award, Apr. 23 2012, ¶ 272).

under BITs by domestic courts without finding a denial of justice.”¹⁶ However, it is “recognized that a high threshold should be applied to . . . determine a breach of FET by domestic courts,” the evaluation of which “is factually driven and the egregiousness of the facts may be more indicative of the threshold applied than the adjectives used by a tribunal to describe the threshold.”¹⁷

Protection against unlawful expropriation has also at times been found to cover misconduct by domestic courts. For example, the *Tatneft v. Ukraine* tribunal stated that “[t]he issue of whether in addition [to an act of appropriation by the legislative or executive branches] an act of expropriation can also originate in the judiciary [is] not in principle excluded under international law and BIT protection.”¹⁸ Additionally, the tribunal in *Sistem v. Kyrgyzstan* found that the court’s conduct resulted in the expropriation of the claimant’s interest in a hotel without discussing denial of justice.¹⁹ Similarly, the *Saipem v. Bangladesh* tribunal found that the Bangladeshi courts’ “actions resulted in substantially depriving [claimant] of the benefit of the ICC Award, and “[s]uch a result [wa]s tantamount to a taking of the residual contract rights arising from the investments as crystallised in the ICC Award.”²⁰

Though it is relatively rare, some BITs also contain an “effective means” clause. In *Chevron v. Ecuador (I)*, the tribunal found that the effective means provision in the U.S.-Ecuador BIT constituted a *lex specialis* and not a restatement of the law on denial of justice, which entails that a distinct and potentially less demanding test is applicable under the effective means standard as compared to denial of justice under customary international law.²¹ Likewise, the *White Industries v. India* tribunal found that the effective means obligation under a BIT may be breached by domestic court conduct even if that conduct does not rise to the level of denial of justice.²²

¹⁶ *Id.* at ¶ 423; see *Arif Award*, ¶ 433 (stating that denial of justice and fair and equitable treatment claims are “distinct and specific”); *Tatneft Award on the Merits*, ¶ 475; *Deutsche Bank Award*, ¶ 478 (finding a denial of due process breach of FET for court conduct even though denial of justice was neither plead nor analyzed); *ATA Construction v. Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶¶ 123, 128 (noting, though the tribunal lacked jurisdiction, that while the denial of justice claim could not have been sustained, the court’s conduct violated the Respondent’s obligations under the BIT).

¹⁷ *Manchester Securities Award*, ¶ 423.

¹⁸ *Tatneft Award on the Merits*, ¶¶ 459–61. The *Tatneft* tribunal did not find expropriation by the judiciary.

¹⁹ *Sistem v. Kyrgyzstan*, ICSID Case No. ARB(AF)/06/1, Award, 12 Apr. 2006, ¶¶ 121–29.

²⁰ *Saipem Award*, ¶ 129.

²¹ *Chevron v. Ecuador (I)*, PCA Case No. 34877, Partial Award on the Merits, 30 Mar. 2010, ¶¶ 241–44.

²² *White Industries v. India*, UNCITRAL, Final Award, 30 Nov. 2010, ¶ 11.4.19.

On the other hand, claims that a legitimate expectation for a particular judicial outcome or interpretation could be a ground for responsibility within the context of the FET standard are usually rejected.²³

RELEVANT CASE OVERVIEW

A. Due Process v. Denial of Justice & Frustration of Legitimate Expectations

i. *Manchester Securities v. Poland*

The tribunal in *Manchester Securities* directly contemplated the issue of whether “the threshold for finding a breach of FET by the courts [is] different from the threshold applicable in the case of denial of justice.”²⁴ However, because the tribunal found that a denial of justice occurred, it stopped short of deciding whether a different or lesser threshold might apply to a broader FET claim.²⁵ In making their arguments, the parties in *Manchester Securities* primarily relied on two cases:²⁶ *Arif v. Moldova* and *Tatneft v. Ukraine*, each discussed below.

ii. *Arif v. Moldova*

In *Arif*, the tribunal at first distinguished FET claims under customary international law from denial of justice claims despite the “continuous ‘cross-pollination’ between the two.”²⁷ However, under the heading of “Denial of Justice under the Fair and Equitable Treatment Standard,” the tribunal evaluated the two relevant court proceedings using terms such as “egregiously wrong,”²⁸ thereby indicating a “threshold reminiscent of denial of justice understood under customary international law.”²⁹ The tribunal eventually dismissed the denial of justice claim and upheld the claim of breach of FET for reasons unrelated to the courts’ actions.³⁰

Interestingly, the tribunal considered that the State created a legitimate expectation in favor of the investor regarding the opening of a duty-free shop.³¹ It found that this legitimate expectation was breached when Moldovan domestic courts decided that investor’s contract was null and void. In its conclusion where the tribunal found a

²³ See Demirkol, *supra*, at 37 (citing *White Industries* Final Award, ¶ 10.3.13; *Eli Lilly* Counter Memorial of Canada, ¶ 285); but see *Arif* Award, ¶¶ 541–47; *infra* § A(ii).

²⁴ *Manchester Securities* Award, ¶ 410.

²⁵ *Id.* at ¶ 424.

²⁶ Claimant additionally discussed the cases of *Deutsche Bank v. Sri Lanka*, *ATA Construction v. Jordan*, *Siapem v. Bangladesh*, *Chevron v. Ecuador*, *Sistem v. The Kyrgyz Republic*, and *White Industries v. India*. *Manchester Securities v. Poland*, PCA Case No. 2015-18, Award, 9 Mar. 2015, ¶ 420.

²⁷ *Arif* Award, ¶ 433.

²⁸ *Id.* at ¶ 453.

²⁹ *Manchester Securities* Award, ¶ 415.

³⁰ *Arif* Award, ¶¶ 454, 497, 556.

³¹ *Id.* at ¶¶ 541–42.

breach of the FET standard, it underscored the role of the direct inconsistency between the administration's attitude endorsing and encouraging the investment and the judiciary's finding on the nullity of the contract.³² However, the judiciary itself did not breach the investor's legitimate expectation; it was either the administration's failure to keep its promise to establish a secure legal framework for the investment or promise of a legal framework that could not be established that amounted to the FET breach.

iii. Tatneft v. Ukraine

The *Tatneft v. Ukraine* tribunal separately assessed whether respondent violated (1) Art. 2(2), which required "complete and unconditional legal protection" and thus prohibited denial of justice as defined under customary international law as a result of alleged procedural irregularities in court proceedings, and (2) the FET provision in Art. 3(1) due to said court misconduct and other State action. In doing so, it implied that a less rigorous standard might apply to a FET claim that falls short of a denial of justice claim.

First, the tribunal discussed the denial of justice standard while determining whether Respondents violated Article 2(2) of the relevant BIT,³³ which stated that investments should receive "complete and unconditional legal protection."³⁴ Because the tribunal found that the standard applicable to the violation of the requirement of complete and unconditional legal protection was linked to the customary international law standard of denial of justice, it conducted the denial of justice analysis as part of the complete and unconditional legal protection analysis.³⁵ Acknowledging that "it is not only the conduct of the courts . . . at issue but also the participation of the State in many of the facts discussed, either by means of the intervention of various ministries and State agencies or in particular that of the Public Prosecutor,"³⁶ the tribunal held that there was no denial of justice with respect to the proceedings' procedural aspects:

³² *Id.* at ¶ 547.

³³ See *Tatneft Award on the Merits*, ¶¶ 338–39 ("Claimant allege[d] that Responded violated Article 2(2) in several ways: it failed to prevent—and later provided legal sanction to—the [enforcement] raid, thereby denying the Claimant's investments of the basic protections under the Ukrainian Civil Code, the Code of Civil Procedure and the Enforcement Law; it deprived the Claimant of its shareholding in Ukratnafta in court decisions—namely, Cases 32/1 and 17/178, that ignored the applicable three-year statute of limitations and were unfounded and unlawful; and it deprived the Claimant of its indirect shareholdings in Ukratnafta, held by AmRuz and Seagroup, in cases 28/128 and 28/128, which were improperly opened, and by subsequently allowing Mr. Ovcharenko to sell these shares that had been improperly appropriated. Even if the court decisions had been issued in compliance with Ukrainian law, which is denied, the Claimant argues that Ukraine in issuing them failed to provide effective means for the assertion of claims and the enforcement of rights with respect to Tatneft's investment.").

³⁴ *Tatneft Award on the Merits*, ¶¶ 351–61.

³⁵ *Id.* at ¶¶ 351–54.

³⁶ *Id.* at ¶ 350.

The Tribunal must first note in this respect that the traditional customary law responsibility arising as a consequence of denial of justice by the State courts is not present in this case, in any event as far as procedural aspects are considered. The courts have been generally available to the affected parties, although there have been questions concerning *ex parte* decisions or proceedings that, *while not necessarily constituting denial of justice might be in breach of other standards of protection*. The delay in deciding cases submitted to courts is not extraordinary as compared to that which occurs in many judicial systems. Evidence concerning nationality-based discrimination is not readily available although there has been in this case a clear intent to substitute Ukrainian interests for those of Tatarstan . . .; it is not possible, however, to establish that this was the consequence of discrimination in terms of nationality, *but might also have an incidence in respect of the breach of other standards of protection. The same holds true in respect of allegations of corruption which have not specifically identified any such instance and are based on a general perception affecting the Ukrainian judiciary.*³⁷

In concluding this section, the tribunal emphasized that the questions of denial of justice “are inseparable from the discussion and findings concerning *other* BIT standards, *in particular the fair and equitable treatment, within which such questions are subsumed.*”³⁸

Then, the tribunal explored whether Respondent breached its FET obligations under Article 3(1) of the relevant BIT, which required fair and equitable treatment, full protection and security, and effective means for the assertion of claims and the enforcement of rights.³⁹ In setting out the relevant standard, the tribunal explained that FET “encompasses today at least: (a) protection against arbitrary and unreasonable measures, discrimination, *and denial of justice*, (b) the right to procedural propriety and due process, and (c) the assurance of a predictable, consistent and stable legal framework.”⁴⁰ Consistent with the distinction it previously made between denial of justice and FET, the tribunal stated that “whether these various decisions amounted to denial of justice is immaterial because what this Tribunal has to determine in the end is whether they were manifestly unfair and unreasonable.”⁴¹

³⁷ *Id.* at ¶ 351 (emphasis added).

³⁸ *Id.* at ¶ 361 (emphasis added).

³⁹ *Id.* at ¶¶ 391–413.

⁴⁰ *Id.* at ¶ 394 (emphasis added).

⁴¹ *Id.* at ¶ 405.

Various aspects of the State's actions in conjunction with the judiciary's conduct amounted to a clear breach of FET.⁴² First, the tribunal found that measures taken by the Ministry of the Interior to enforce court decisions "went beyond any normal enforcement of court decisions, particularly from the point of view of the use of force and physical occupation, including the subsequent participation of the Ministry of the Interior's troops to secure the occupation of the plant."⁴³ While this conduct alone "raise[d] important questions about whether the FET standard was adequately observed,"⁴⁴ the tribunal stated that the determination of breach at this point was "inseparable from the discussion of the [relevant] judicial decisions."⁴⁵ It then found that the domestic court decisions arbitrarily and unreasonably deprived the investor of control over its company.⁴⁶ These facts were analyzed alongside procedural defects in the judicial proceedings including multiple *ex parte* decisions and orders issued by the District Court, a failure to stipulate a voluntary period for compliance associated with enforcement proceedings, delays, and the reopening of a case without properly serving the respondent party.⁴⁷ These facts led the tribunal to conclude that "[d]ue process issues and procedural propriety were . . . compromised" without requiring that these measures met the level of denial of justice.⁴⁸

The State and judicial misconduct was further amplified by the actions of the Public Prosecutor, who reopened various cases beyond the statute of limitations and assumed a "questionable role" in the relevant proceedings.⁴⁹ Ultimately, the tribunal found that as a result of the State and judiciary conduct, "the Claimant was beyond doubt deprived of the control and management of the company, and ultimately of its membership," and therefore Respondent breached its FET obligations.⁵⁰

In concluding this analysis, the tribunal indicated that a lesser threshold applies to a FET claim that does not arise to the level of denial of justice:

Judicial impropriety, grave and manifest injustice and bad faith are concepts closely associated to [the contemporary

⁴² See *id.* at ¶ 372 ("The Claimant contends that the Respondent breached the fair and equitable treatment standard in the following ways. First, it claims that the Respondent subjected the investments of the Claimant to arbitrary and unreasonable measures, including the deprivation of control, management, and ownership of Ukratnafta. In particular, the Claimant regards as unfair and unreasonable the 26 September 2007 court decisions that led to the events of 19 October 2007 and the reinstatement of Mr. Ovcharenko and the subsequent court decisions that deprived the Claimant of its direct and indirect shareholdings in Ukratnafta."). This judicial conduct also served as part of the basis for Claimant's breach of Article 2(2) claim. *Supra*, note 5.

⁴³ *Id.* at ¶ 396.

⁴⁴ *Id.* at ¶ 397.

⁴⁵ *Id.*

⁴⁶ *Id.* at ¶ 404.

⁴⁷ *Id.* at ¶¶ 397–401, 406.

⁴⁸ *Id.* at ¶¶ 404–05.

⁴⁹ *Id.* at ¶¶ 402, 404.

⁵⁰ *Id.* at ¶¶ 403, 412.

understanding of FET] and indeed have a very important role to play in the consideration of liability for breach of the FET. But as has been noted, such a high standard is not the only one relevant in the present protection of rights under the FET. Conduct which might not be as grave as to amount to egregiousness or bad faith but which nonetheless interferes with the legitimate exercise of rights of the protected individual might equally qualify as a kind of conduct resulting in liability. This does not alter the conclusion that a mere misapplication of domestic law is not enough to give rise to liability absent some kind of adverse intention.⁵¹

While subsequently analyzing whether respondent violated the FET prohibition on unlawful expropriation,⁵² the tribunal again emphasized that though there was no denial of justice, the court's actions patently breached Respondent's FET obligations:

While deference [to domestic courts] has been occasionally understood as finding its limits only in cases amounting to "denial of justice," and the latter has been again interpreted in light of the high standards of egregiousness, manifest injustice, lack of due process, offending judicial propriety, arbitrariness, bad faith and clear and malicious application of the law, this understanding is again related to the issue of the international minimum standard discussed above. In the ambit of FET, deference is further limited by a variety of considerations arising from equitableness and reasonableness. *In this sense a decision can be inequitable and unreasonable without rising to levels as dramatically wrong as those just mentioned, and still eventually engage liability for the breach of the FET standard.*⁵³

The Tribunal has concluded above that in this case there are no sufficient reasons to justify a finding of denial of justice. However, it is quite evident that the fair and equitable treatment standard has been compromised by a number of court actions. In this respect such standard has a broader meaning than the strict denial of justice as understood under traditional customary international law. Even though fair and equitable treatment is not always regarded as an integral part of customary law, it reflects the evolution that the very

⁵¹ *Id.* at ¶ 411.

⁵² *Id.* at ¶¶ 459–81.

⁵³ *Id.* at ¶ 475 (emphasis added).

rules of customary law have experienced in the light of current treaties and jurisprudence. Denial of justice thus becomes inseparable from fair and equitable treatment and both standards will supplement each other to the point that they may be considered as expressions of the updated contents of customary law as presently understood.⁵⁴

Notably, in conducting the FET analysis, the *Tatneft* tribunal briefly asserted that the procedural defects in the relevant court proceedings “frustrate[ed] [] the legitimate expectations by the Respondent of a predictable, consistent and stable legal framework for the Claimant’s investments.”⁵⁵ Further, it found that the Claimant endured discrimination in violation of FET when other companies received different treatment than Claimant in judicial proceedings.⁵⁶ “Frustration of legitimate expectations,” “lack of a predictable, consistent, and stable legal framework,” and “discrimination,” are three additional claims encompassed by the FET standard.⁵⁷

iv. Deutsche Bank v. Sri Lanka

The *Deutsche Bank* case is factually similar to our case. Rather than pleading denial of justice, the Claimants there claimed that they were subjected to various unfair procedural defects in the Sri Lankan court system:

In a five page judgment rendered less than 48 hours after the filing of the petition, [the Court] granted all the claims formulated by petitioners based on what appears to have been extremely limited evidence and without hearing from the various banks whose contractual rights were directly affected by the Order.⁵⁸

In addition to these procedural errors, the Sri Lankan Chief Justice publicly confirmed that the order in question was “issued for political reasons.”⁵⁹

The tribunal, without discussing whether the judicial acts amounted to a denial of justice analysis, found that Supreme Court of Sri Lanka’s interim order was lacking in due process and breached the Respondent’s FET obligations.⁶⁰

⁵⁴ *Id.* at ¶ 481 (emphasis added).

⁵⁵ *Id.* at ¶ 407.

⁵⁶ *Id.* at ¶¶ 408–09.

⁵⁷ *Id.*

⁵⁸ *Deutsche Bank Award*, ¶ 476.

⁵⁹ *Id.* at ¶ 479.

⁶⁰ *Id.* at ¶ 478 (“The Arbitral Tribunal decides that reaching such a conclusion and issuing the Order as detailed above with its far-reaching consequences, without a proper examination and without giving

It also found that the actions of Sri Lanka's Central Bank, which were independent and separate from the conduct of the Supreme Court, violated Respondent's FET obligations. Because (1) the Central Bank conducted an investigation based on improper motives, *id.* at ¶¶ 481–82; (2) the government acted in bad faith, *id.* at ¶¶ 483–84; (3) the Bank's investigation lacked transparency and due process, *id.* at ¶¶ 485–89; and (4) the Bank acted in excess of its powers, *id.* at ¶ 490, Respondent was further responsible for breaching the bilateral investment treaty.

the banks involved an opportunity to respond, constitutes a breach of the fair and equitable treatment obligation of Article 2(2) of the BIT in form of a due process violation.”).

Applicant Details

First Name **David**
 Last Name **Wechsler**
 Citizenship Status **U. S. Citizen**
 Email Address dew327@nyu.edu
 Address

Address
Street
70 Morton Street
City
New York
State/Territory
New York
Zip
10014
Country
United States

Contact Phone Number **9175477737**

Applicant Education

BA/BS From **Cornell University**
 Date of BA/BS **May 2017**
 JD/LLB From **New York University School of Law**
<https://www.law.nyu.edu>
 Date of JD/LLB **May 19, 2021**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Annual Survey of American Law**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **Yes**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Samaha, Adam
adam.samaha@nyu.edu
212-998-2660

Katzmann, Gary
Gary_Katzmann@cit.uscourts.gov
212-264-2842

Kaufman, Brett
bkaufman@aclu.org
(212) 549-2603

This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 18, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am a litigation associate at Paul, Weiss, and I write to apply for a clerkship in your chambers for the 2023 term. I have focused my legal studies on the intersection of law, technology, and civil liberties, working with the ACLU and Policing Project during law school. My goal is to utilize this education to ensure that technology be harnessed for the public good, and I believe clerking in your chambers would be great mentorship for such a career.

Enclosed please find my resume, law school transcript, undergraduate transcript, and writing sample. My writing sample is a bench memorandum I wrote during my judicial internship at the U.S. Court of International Trade. My recommenders are Judge Gary Katzmann, ACLU Senior Staff Attorney Brett Kaufman, and Professor Adam Samaha. I was a judicial intern for Judge Katzmann, a clinical intern for Brett Kaufman, and a three-time student of Professor Samaha.

Thank you for your consideration.

Respectfully,

David Wechsler

DAVID WECHSLER

70 Morton Street, Apt. 1. New York, NY 10014
917-547-7737
david.wechsler@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

J.D., *cum laude*, May 2021

Unofficial GPA: 3.65

Honors: *Ann Petluck Poses Memorial Prize* (designated by Dean for outstanding work in clinical course)
Annual Survey of American Law, Managing Editor

Activities: Suspension Representation Project, Advocate
Advanced Technology Law and Policy Clinic, Participant

CORNELL UNIVERSITY, Ithaca, NY

BS in Policy Analysis and Management, May 2017

Cumulative GPA: 3.94

Honors: Policy Analysis and Management Outstanding Senior

Activities: Teaching Assistant, Introduction to Policy Analysis
Cornell Daily Sun, Staff Writer

EXPERIENCE

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, New York, NY

Litigation Associate, October 2021-Present

POLICING PROJECT AT NYU LAW, New York, NY

Legal Fellow, August 2020-May 2021

Researched and presented on various legal and policy issues related to technology and policing, including facial recognition software, predictive policing, and gang databases.

GUNDERSON DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN LLP, New York, NY

Summer Associate, Summer 2020 (Offer extended)

Rotated through the intellectual property and corporate groups.

AMERICAN CIVIL LIBERTIES UNION, New York, NY

Clinical Intern (Speech, Privacy, and Technology Project), August 2019-December 2019

Co-wrote litigation memo evaluating Fourth Amendment issues arising from law enforcement's use of a novel form of technology-enhanced surveillance.

THE HONORABLE GARY KATZMANN, U.S. COURT OF INTERNATIONAL TRADE, New York, NY

Judicial Intern, Summer 2019

Drafted questions for oral arguments, prepared bench memorandum, and aided in drafting opinion on case regarding an antidumping duty order as it relates to a consumer product. Provided feedback to clerks on draft opinions.

GOLDMAN, SACHS & CO, New York, NY

Investment Banking Division, Real Estate, Gaming and Lodging, June 2017-August 2018; *Intern*, Summer 2016

ADDITIONAL INFORMATION

Serve as mentor to high school student through iMentor program. New York State High School Golf Champion and NYC Marathon Finisher. Overly optimistic fan of New York sports teams (Mets / Jets / Knicks).

Name: David E Wechsler
 Print Date: 07/02/2021
 Student ID: N11255623
 Institution ID: 002785
 Page: 1 of 2

New York University
 Beginning of School of Law Record

Degrees Awarded
 Juris Doctor
 School of Law
 Honors: cum laude
 Major: Law
 05/19/2021

Fall 2018

School of Law
 Juris Doctor
 Major: Law
 Lawyering (Year) LAW-LW 10687 2.5 CR
 Instructor: Jacob Victor
 Torts LAW-LW 11275 4.0 B
 Instructor: Christopher Jon Sprigman
 Procedure LAW-LW 11650 5.0 B
 Instructor: John Sexton
 Contracts LAW-LW 11672 4.0 B+
 Instructor: Kevin E Davis
 1L Reading Group LAW-LW 12339 0.0 CR
 Topic: Decision by Algorithm
 Instructor: Katherine J Strandburg

Spring 2019

School of Law
 Juris Doctor
 Major: Law
 Lawyering (Year) LAW-LW 10687 2.5 CR
 Instructor: Jacob Victor
 Legislation and the Regulatory State LAW-LW 10925 4.0 B+
 Instructor: Adam M Samaha
 Criminal Law LAW-LW 11147 4.0 A
 Instructor: Rachel E Barkow
 1L Reading Group LAW-LW 12339 0.0 CR
 Topic: Decision by Algorithm
 Instructor: Katherine J Strandburg
 Survey of Intellectual Property LAW-LW 12469 4.0 B
 Instructor: Christopher Scott Hemphill
 Financial Concepts for Lawyers LAW-LW 12722 0.0 CR

Fall 2019

School of Law
 Juris Doctor
 Major: Law
 Art Law LAW-LW 10122 4.0 A-
 Instructor: Amy M Adler
 Constitutional Law LAW-LW 11702 4.0 A-
 Instructor: Adam M Samaha
 Technology Law and Policy Clinic LAW-LW 12148 3.0 A
 Instructor: Brett Kaufman
 Jason Michael Schultz
 Technology Law and Policy Clinic Seminar LAW-LW 12149 3.0 A
 Instructor: Brett Kaufman
 Jason Michael Schultz

Current 14.0
 Cumulative 44.0

Spring 2020

School of Law
 Juris Doctor
 Major: Law
 --
 Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
 --
 Negotiation LAW-LW 11642 3.0 CR
 Instructor: Dina R Jansenson
 Property LAW-LW 11783 4.0 CR
 Instructor: Shitong Qiao
 Income Taxation LAW-LW 11994 4.0 CR
 Instructor: Laurie L Malman
 Supreme Court Seminar LAW-LW 12064 2.0 CR
 Instructor: Troy A McKenzie
 Yaira Dubin
 Sina Kian
 Current AHRS 13.0
 Cumulative 57.0

Fall 2020

School of Law
 Juris Doctor
 Major: Law
 Criminal Procedure: Fourth and Fifth Amendments LAW-LW 10395 4.0 A
 Instructor: Stephen J Schulhofer
 First Amendment Seminar LAW-LW 11824 2.0 A
 Instructor: Burt Neuborne
 Fashion Law and Business LAW-LW 12131 3.0 A
 Instructor: Douglas Arthur Hand, Jr.
 Ethics in Government: Investigation and Enforcement LAW-LW 12211 2.0 B+
 Instructor: Ellen N Biben
 Linda Laceywell
 Constitutional Interpretation Seminar LAW-LW 12253 2.0 A
 Instructor: Adam M Samaha
 Current AHRS 13.0
 Cumulative 70.0

Spring 2021

School of Law
 Juris Doctor
 Major: Law
 Corporations LAW-LW 10644 5.0 A
 Instructor: Marcel Kahan
 Federal Courts and the Federal System LAW-LW 11722 4.0 A
 Instructor: Helen Hershkoff
 Advanced Technology Law and Policy Clinic LAW-LW 12429 3.0 A
 Instructor: Brett Kaufman
 Jason Michael Schultz
 Advanced Technology Law and Policy Clinic Seminar LAW-LW 12430 2.0 A-
 Instructor: Brett Kaufman
 Jason Michael Schultz
 Current AHRS 14.0
 Cumulative 84.0
 Staff Editor - Annual Survey of American Law 2019-2020
 Managing Editor - Annual Survey of American Law 2020-2021
 Ann Petluck Poses Memorial Prize

Name:	David E Wechsler
Print Date:	07/02/2021
Student ID:	N11255623
Institution ID:	002785
Page:	2 of 2

End of School of Law Record

Unofficial

David Wechsler
Cornell University
Cumulative GPA: 3.94

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Psychology		A	3	
Writing Seminar: Greek Mythology		A	3	
Intro to Policy Analysis		A+	4	
Entrepreneurship Speaker Series		A-	1	
Intro to Microeconomics		A	3	
Dean's List				

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Empirical Research		A	3	
Writing Seminar: True Stories		A-	3	
Population and Public Policy		B+	3	
Intermediate Microeconomics		A-	4	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Teaching Apprenticeship		A+	3	
Statistics for PAM Majors		A	4	
Intro to American Government and Politics		A	4	
Economics of the Public Sector		A	4	
Introduction to Sociology		A-	3	
Dean's List				

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Environmental Psychology		CR	3	
Corporations, Shareholders, and Public Policy		A	3	
Cost-Benefit Analysis		B+	4	
Multiple Regression Analysis		A	4	
Empirical Research		A	3	
Dean's List				

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
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Behavioral Public Policy	B+	3
Empirical Research	A	3
Financial Accounting Principles	A+	3
Neighborhoods, Housing, and Urban Policy	A	3
Introduction to Oceanography	A+	3
Dean's List		

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Czech Language		A-		
European Integration: How and Why		A-		
Ideas Behind Politics: Communism, Post-Communism, and Civil Society in Czech Republic				
Comprehending the Holocaust		A-		
Prague as a Living History		A		

This semester was at the Charles University in Prague as part of the Cornell Abroad program. The grades from this semester are not included in my Cornell cumulative GPA, per Cornell rules.

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law of Internet and E-Commerce		A	3	
Robot Ethics		A-	3	
Empirical Research		A	3	
Regulating Financial Institutions		A+	3	
Racial/Ethnic Identity Development		A	3	
Intro to Bio: Ecology and the Environment		A-	3	

Dean's List

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Empirical Research		A	3	
Mathematics and Politics		A-	3	
Economics of Risky Health Behaviors		A+	4	
Evolving Families and Challenges to Public Policy		A	3	
Adolescence and Youth Development		A	3	

Dean's List

March 18, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

David Wechsler is applying for a clerkship in your chambers, and I write to recommend him enthusiastically and without reservation. David is a standout legal thinker with an impressive range of skills, and he is exceptionally well-prepared to be a superb law clerk. Nearly no other applicant enjoys the same collection of analytical precision, poise, and ability to work cooperatively in a team. David will be an unswervingly dedicated and able law clerk. I respectfully recommend that you interview and hire him before someone else does.

David was a student of mine in two large classes plus a seminar. He was terrific in each setting, and got even better each year. In my course for first-year students, Legislation and the Regulatory State, we examine technical doctrine as well as systemic legal questions. We study how courts grapple with statutory language, legislative history, canons of construction, agency regulations, and constitutional claims within particular case settings—yet we also explore how various legal institutions interact with each other and the rest of society. Only exceptionally adept students, such as David, can achieve thorough understandings of both the technical legal elements and the system-wide facets of the course. David was remarkably comfortable with the issues from the start. He was an unerringly prepared and wonderfully reliable participant throughout the semester. All of the above observations hold for his work in my Constitutional Law course during the following autumn. The complexity level in that course is higher still, given the ground that we cover. We study not only constitutional structure and interpretive methods, but also a mix of rights claims. David responded with hard work, a constructive attitude, and remarkable thoughtfulness. His ability to communicate sharp ideas in a welcoming manner was much appreciated.

In our seminar on Constitutional Interpretation during the present academic year, I was able to spend more time with David's ideas about law. The seminar is capped at twenty students and is divided into two parts: foundational ideas about constitutional interpretation, then cutting-edge scholarship on a range of narrower topics. The first part includes short student writings on classic works of scholarship as source material for classroom discussions; the second part involves live discussions with guest authors. David excelled in both parts. His ideas were sophisticated and incisive, and he repeatedly volunteered probing questions for our guest scholars. In his final paper, David considered the developing theory and practice of originalism over the last several decades, and the sometimes surprising connections to progressive or liberal causes during recent years. His writing demonstrated broad knowledge and daring analytical effort, in exploring claims that our constitutional system has become preoccupied with "effective labeling" and has allowed the text to become a "springboard for fringe ideas." I valued greatly David's ability to refine his thinking over time, and to join together his ideas about law, interpretive methods, and broader forces in society beyond courtrooms. He received the top score in the seminar for his participation and writings combined.

As David's electronic record indicates, my experience with him is not exceptional. David has excelled in a range of law school courses and employment experiences. He will start his career as an attorney this coming autumn at one of the nation's leading law firms, he already has developed a special acuity with intellectual property, and he interned with both the ACLU and a judge who is a leading light on the Court of International Trade. Add to all of that David's experiences with banking, policing, and technology issues, he stands out for his dedication and breadth of commitment to law and its proper role in social life. He will take a clerkship as seriously as he has conducted his other pursuits, and he will stand out in that position as well.

Perhaps less obvious from the file is David's solid temperament and relaxed personality. Conscientious and responsive, diligent and quick, David looks for ways to improve everyone's performance. I saw this in the classroom with his fellow students, and in his work as a lead organizer for a law journal symposium on gun regulation reform in which I will participate this spring. David is friendly, intelligent, and efficient—a welcome combination that is, perhaps, too difficult to find in young lawyers. He can juggle many tasks and topics while treating everybody around him with respect. Anyone would be thrilled to join David in the workplace.

As a former law clerk, as an attorney, and as a law professor, I understand the important duties and responsibilities associated with a clerkship. In my judgment, David Wechsler has all of the intelligence, training, skill, and dedication to be a truly excellent law clerk. I hope that you will be convinced of David's ability and commitment to serving your court, and I respectfully recommend that you interview and hire him.

Please contact me at the cellphone number below if I can be of further assistance.

Sincerely,
Adam M. Samaha
773 355 1016 (cell)

Adam Samaha - adam.samaha@nyu.edu - 212-998-2660

United States Court of International Trade
One Federal Plaza
New York, NY 10278



CHAMBERS OF
Gary S. Katzmann
JUDGE

Dear Judge,

I write on behalf of David Wechsler, who has applied to your Chambers for a law clerk position. David worked for me as an intern in the summer of 2019. I am pleased to support his application with great enthusiasm and without reservation. Indeed, I have encouraged him to seek a clerkship. He will be an outstanding law clerk.

I write with the perspective of some 16 years on the bench, serving twelve years as an Associate Justice on the Massachusetts Appeals Court and, now nearly four years as a Judge on the United States Court of International Trade. David graduated from Cornell University in 2017, with a B.A. in Policy Analysis and Management (and a distinguished 3.94 GPA). Prior to law school, he worked for more than one year in the Investment Banking Division of Goldman, Sachs and Company, managing due diligence as an advisor to clients in complex sales. In 2018, David entered the New York University School of Law.

In the summer of 2019, it was my good fortune that David worked for me as a judicial intern. That his product was outstanding is all the more impressive because he came to Chambers with having just completed his first year of law school. I assigned him a very challenging international trade case, requiring navigation of a complex administrative record, analyzing

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numerous briefs, and mastering a myriad of difficult issues of substantive law, jurisdiction and procedure. Extraordinarily conscientious, David was totally thorough in his research and writing – indeed, going above and beyond. His college and work experience no doubt contributed to his comfort with detail and complex records and arguments. He showed tremendous capacity to parse complicated questions. He did an excellent job drafting questions that were sent to the attorneys in advance of oral argument. He also wrote a comprehensive bench memorandum that set out the questions carefully and in a balanced way addressed the positions of the litigants. David writes clearly and concisely. His memorandum was very useful to me as I considered how the case should be adjudicated. I truly valued our discussions.

Wonderfully efficient, David is a self-starter who has the quiet confidence to ask questions. He embraced suggestions and welcomes feedback. He will turn around a draft without delay. I was so impressed with David's work that I asked him to review drafts in other cases not his own. Earnest and humble, an engaging conversationalist, collegial and a true team player, David quickly became a valued member of Chambers. We were all sorry to see him leave when the summer ended.

Quite apart from his academic excellence in law school, David has taken on many activities that will only enhance his work as a law clerk. He has been a research assistant for a professor and has been named Managing Editor of Solicitations for the Annual Survey of American Law. I have been impressed by David's hope that he can apply his legal training for the betterment of the community. That is more than an aspiration, as demonstrated by his involvement as an advocate for the Suspension Representation Project on behalf of students in New York City public schools, and by his service during the coming year as a Student Legal Fellow for the NYU Policing Project.

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It does not take long in conversation with David to understand that he has wide-ranging interests and curiosity. He is also well-rounded— not simply a sports fan, he is in fact a high school golf champion and participant in NYU's Deans' Cup Basketball Team. His enthusiasm lifts the spirits of all around him.

I am confident that David will be a leader in the years ahead in the best and broadest traditions of the legal profession. I think that his will be an outstanding career. I am pleased to recommend David Wechsler for a judicial clerkship with great enthusiasm and without reservation. I am happy to chat further. Please do not hesitate to contact me at (212) 264-1757.

Very truly yours,


Judge

September 3, 2020

RE: David Wechsler, NYU Law '21

Your Honor:



National Office
125 Broad Street, 18th floor
New York NY 10004
(212) 549-2500
aclu.org

It is my pleasure to strongly recommend David Wechsler for a clerkship in your chambers. In my eight years as an attorney for the American Civil Liberties Union and my six years as a teacher in the NYU Technology Law & Policy Clinic, I have had the privilege of supervising an extraordinarily talented group of legal fellows, interns, and law students. Among them, David stands out, particularly for his creative legal thinking and outstanding legal writing abilities. Based on these qualities and my own past experiences as a judicial clerk for three different federal judges, I am confident that he has what it takes to be a wonderful law clerk.

During David's semester in the clinic under my supervision, he very much impressed me and my ACLU colleagues with a truly fantastic project. David and a partner were assigned to work with ACLU staff attorneys to prepare a full litigation memorandum concerning a potential mass aerial surveillance program over an American city. Specifically, David conducted factual and legal research and reconsidered precedential opinions addressing aerial surveillance in light of the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). As fortune would have it, just weeks after David and his partner put the finishing touches on their memorandum—which addressed standing, state action under 42 U.S.C. § 1983, and the merits of Fourth and First Amendment claims, among other smaller issues—the City of Baltimore voted to implement a system just like the one their memorandum had contemplated. Because of the excellent work David and his partner did in putting together a comprehensive 50-page litigation plan, the ACLU was poised to file a lawsuit on an unusually fast timeline, and we thanked the students publicly for their efforts at the end of our initial brief.

David's assignment was a real challenge. It required creative approaches to distinguishing old, seemingly on-point precedent holding various types of aerial surveillance of public places unconstitutional. It required a deepread of (and many in-depth discussions with ACLU staff attorneys about) *Carpenter*, in addition to recent judicial and academic applications of it, and a projection of how its conclusions could support claims in our potential lawsuit. And it required an analytical approach that was broad enough to cover various potential aerial surveillance systems without

David Wechsler, NYU Law '21
September 3, 2020
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knowing which, if any, would ultimately be at issue. Despite these challenges, the work was an unqualified success.

Moreover, David had very little familiarity with Fourth Amendment law (and ACLU positions on those issues) coming into the project, but was able to prepare himself for deep engagement in a relatively short time frame—no doubt, the ideal type of training for a future law clerk. He threw himself into academic scholarship and reams of old cases to first think through, outline, and discuss our potential arguments, then to draft fair-handed and honest analysis evaluating the strengths and weaknesses of our arguments. Not only did he get up to speed quickly, but he became fluently conversant in the issues, and participated in complex discussions with his partner, me, and my ACLU colleagues about the arguments we were considering, often challenging our assumptions or bringing to light complications or arguments we hadn't fully considered. Building off of this experience, he applied to become and was accepted as a year-long legal fellow in the NYU School of Law's Policing Project beginning next fall.

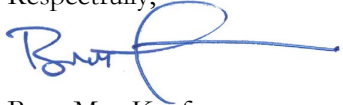
As a former appellate and district court clerk, I know how much a top-notch writing ability—clarity, organization, thoroughness, and readability—is prized in chambers. Having supervised David on a complex writing project, I am confident he is a smart bet to produce organized, thoughtful, high-quality work on a rigorous timeline as a clerk. His drafts were carefully argued and thought-through, not to mention cleanly presented and accurately cited (no doubt helped by his experience on the *Annual Survey of American Law*). In addition, I was especially struck by David's receptiveness to criticism, and his advanced ability to productively implement comments from me and others. Having to defend his work to subject-matter experts at the ACLU as a professional colleague, rather than simply a student, was an experience that was at once humbling and confidence-building for David. I know from our private supervisory conversations that he learned tremendously from these experiences, which made him extremely excited about becoming a lawyer, and about the unique and rewarding experience of being a law clerk.

Finally, our clinic does not focus only on output; rather, we consistently emphasize process. David was consistently engaged in our class discussions about lawyering, ethics, and the interaction of law and technology. In particular, he led a quite memorable and well-prepared session about various forms of algorithmic decision making (including a fair assessment of their benefits and perils), with concrete examples, excellent classroom prompts, and a knack for facilitating discussion. Little wonder, then, that David was one of the most active and helpful contributors to other students' workshops of their own clinical projects. He regularly demonstrated that he had deeply engaged with their work and had put in time to think about ways to improve it, all while remaining modest and even-keeled. These are the marks of an excellent colleague, and David was indeed respected and admired by his colleagues and his teachers.

David Wechsler, NYU Law '21
September 3, 2020
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Thank you for your consideration of David. I strongly recommend that you hire him as your clerk. If I can offer any further information or be of assistance in any way, please do not hesitate to contact me by email or phone.

Respectfully,



Brett Max Kaufman
Senior Staff Attorney, ACLU Center for Democracy
Adjunct, NYU Technology Law & Policy Clinic
125 Broad Street—18th Floor
New York, New York 10004
212.549.2603 | bkaufman@aclu.org

My writing sample is an excerpt from a 2019 bench memorandum sent to the Honorable Judge Gary S. Katzmman during my judicial internship at the U.S. Court of International Trade. In the memorandum I recommend the scope of an antidumping duty order for corrosion resistant steel excludes a consumer product that incorporates such steel in its manufacturing process. I changed the names of the parties and deleted several footnotes for brevity. Judge Gary S. Katzmman has approved the use of this bench memorandum as a writing sample.

NATURE OF THE CASE

This case involves issues of proper scope interpretation. Plaintiff Company X (“Company X”) imports finished pool kits and pool walls (collectively, “pool products”) from Canada to the United States that are ready to construct into above ground pools with no further modification by customers. Company X requested a scope inquiry clarifying that its pool products, partially made from corrosion resistant steel (“CORES”), did not fall within the antidumping duty order for CORES from Italy and the People’s Republic of China (“China”). After reviewing Company X’s request, the U.S. Department of Commerce (“Commerce”) determined that Company X’s pool products were mixed-media items -- products that are merely combinations of subject and non-subject merchandise -- and no published guidance existed to overcome the presumption that mixed-media items fall within the scope of Commerce’s Final Order (“Order”). Thus, Company X’s products were subject to the antidumping duty. Company X now challenges the scope ruling of Commerce, arguing that the plain language of the Order does not cover downstream items like their pool products and a mixed-media analysis does not apply. Thus, they should not be subject to the antidumping duty order.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516(a)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion [by Commerce] found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” Substantial evidence includes “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consol. Edison Co. of New York v. NLRB, 305 U.S. 197, 229 (1938)). In undertaking this analysis, the

court grants “significant deference to Commerce’s interpretation of a scope order.” Mid Continent Nail Corp. v. United States, 725 F.3d 1295, 1300 (Fed Cir. 2013) (“Mid Continent”) (quoting Global Commodity Group LLC v. United States, 709 F.2d 1134, 1138 (Fed Cir. 2013)). But to support its findings, Commerce must also “explain the standards that it applied and demonstrate a rational connection between the facts on the record and the conclusions drawn.” Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

BACKGROUND

A. Legal and Regulatory Framework of Scope Determinations Generally

“When participants in a domestic industry believe that competing foreign goods are being sold in the United States at less than their fair value, they may petition Commerce to impose antidumping duties on importers.” Mid Continent, 725 F.3d at 1297–98 (citing 19 U.S.C. § 1673a(b)). If Commerce determines that “the subject merchandise is being, or is likely to be sold in the United States at less than its fair value,” and the ITC determines a domestic industry is injured as a result, Commerce issues an antidumping duty order. See 19 U.S.C. § 1673d(a), (b). Once the order is issued, importers may ask for scope rulings, seeking to clarify the scope of the order as it relates to their particular product. See generally 19 C.F.R. § 351.225.

Commerce often must determine whether a product is included within the scope of an antidumping duty order because it necessarily writes scope language in general terms. See 19 C.F.R. § 351.225(a). Commerce’s determinations concerning a particular product are made in accordance with its regulations. See 19 C.F.R. § 351.225. Although “Commerce is entitled to substantial deference with regard to its interpretation of its own antidumping duty orders,” King Supply Co. v. United States, 674 F.3d 1343, 1348 (Fed Cir. 2012) (citing Tak Fat Trading Co. v. United States, 396 F.3d 1378, 1382 (Fed Cir. 2005)), “the question of whether the unambiguous

terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law” that the court reviews de novo. Meridian Prods., LLC v. United States, 851 F.3d 1375, 1382 (Fed Cir. 2017) (citing Alleghany Bradford Corp. v. United States, 28 CIT __, __, 342 F. Supp. 2d 1172, 1183 (2004)). “The question of whether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence.” Novosteel SA v. United States, 284 F.3d 1261, 1269 (Fed Cir. 2002)).

The framework for determining the scope of an order is set forth in the Department’s regulations. See 19 C.F.R. § 351.225(k). The court has established that Commerce should engage in a three-step analysis to determine whether merchandise falls within the scope of an order, providing:

First, Commerce examines the language of the order at issue. If the terms of the order are dispositive, then the order governs . . . Second, if the terms of the order are not dispositive, Commerce must then determine whether it can make a determination based upon the factors listed in 19 C.F.R. § 351.225(k)(1). . . . These factors are “the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations [of Commerce] (including prior scope determinations) and the Commission.” 19 C.F.R. § 351.225(k)(1). . . . If a Section 351.225(k)(1) analysis is not dispositive, Commerce then applies the five “Diversified Products” criteria as specified in 19 C.F.R. § 351.225(k)(2).

Polites v. United States, 35 CIT __, __, 755 F. Supp. 2d 1352, 1354–55 (2011).

The Federal Circuit has held that for the plain meaning in a scope determination to be dispositive, it must be “supported by substantial evidence, considering the § 351.225(k)(1) criteria, in view of the record as a whole -- including evidence that [certain merchandise] was excluded from Commerce’s and the Commission’s investigations.” A.L. Patterson, Inc. v. United States, 585 Fed. Appx. 778, 784 (Fed Cir. 2014) (“Patterson”). The Federal Circuit continued, “[e]ven when merchandise is facially covered by the literal language of the order, it may still be outside the scope if the order can reasonably be interpreted so as to exclude it.” Id.

B. Legal Framework for Scope Rulings Involving Mixed-Media Items

Mixed-media items are items in which otherwise subject merchandise is packaged and imported together with non-subject merchandise. Whether a mixed-media item falls within the scope of an order is subject to a specialized analysis distinct from the traditional scope analysis discussed above. While the mixed-media analysis overlaps with a traditional scope analysis, it is used as the scope test only when Commerce must determine whether potentially subject-merchandise included within a mixed-media item is subject to an order. However, before Commerce engages in a “mixed-media” analysis, it must make a threshold inquiry: whether the item as imported in its assembled condition qualifies as a mixed-media item in the first instance. See Maclean Power, L.L.C. v. United States, 43 CIT __, __, 359 F. Supp. 3d 1367. The Federal Circuit defines “mixed-media” in the context of scope rulings as a set of products that are “merely a combination of subject and non-subject merchandise, and not a unique product.” Walgreen Co. v. United States, 620 F.3d 1350 (Fed Cir. 2010). Helpful in this initial phase is evaluating whether the subject merchandise can be identified and utilized separately from the mixed-media item. Id. If this initial inquiry is satisfied, Commerce then engages in a two-step framework the Federal Circuit provided in Mid Continent governing Commerce’s scope analysis of mixed-media items.¹

C. Factual and Procedural History of the CORES Order

¹ First, Commerce determines whether the potentially subject merchandise included within the mixed-media item is within the literal terms of the antidumping duty order. Mid Continent, 725 F.3d at 1302. In the second step, if neither the text of the order nor its history “indicate [] that subject merchandise should be treated differently on the basis of its inclusion within a mixed-media item,” then “a presumption arises that the included merchandise is subject to the order.” Id. at 1304. The presumption that the mixed-media item is within the scope of the order applies unless Commerce identifies “published guidance issued prior to the date of the original antidumping order [] that provides a basis for interpreting the order contrary to its literal language.” Id. at 1304

United States Steel Corporation, Nucor Corporation, Steel Dynamics Inc., California Steel Industries, ArcelorMittal USA LLC, and AK Steel Corporation (“Petitioners”) filed antidumping and countervailing duty petitions on June 3, 2015 with Commerce and the ITC requesting the initiation of investigations with respect to imports of certain CORES products from China, the Republic of Korea, India, Italy, and Taiwan (“Petition”). See Certain Corrosion-Resistant Steel Products from China, India, Italy, Korea, and Taiwan: Determinations, 81 Fed. Reg. 47,177 (July 20, 2016) (“ITC Investigation”). On June 30, 2015, Commerce initiated the antidumping and countervailing duty investigations on CORES products from these areas, and on June 2, 2016, Commerce published determinations. Id. On July 15, 2016, the ITC issued a notice of its affirmative finding that an industry in the United States is materially injured by reason of imports of certain CORES products from China, India, Italy, Korea, and Taiwan. Id. On July 25, 2016, Commerce issued antidumping and countervailing duty orders on these products. Order, 81 Fed. Reg. at 48,391, 48,389, App. I. The scope of the Order covers, in pertinent part, “steel products, either clad, plated, or coated with corrosion resistant metals.” Id.

D. Factual and Procedural History of this Case

The products under consideration in Company X’s scope ruling request are finished pool products made of steel and non-steel components. While subject CORES from China and Italy is used to produce part of Company X’s pool products, the steel undergoes further processing and manufacturing in Canada. Pl.’s Br. at 2. Company X explains that, as a result of its Canadian manufacturing, the steel satisfies the requisite tariff shift from subheading 7210.70 (flat-rolled products of steel) to 9506.99.550 (swimming pools and parts thereof) and thus is a Canadian origin product for customs purposes. Id. Company X’s pools are imported as a finished goods kit. Id. at 3. When imported (in multiple boxes due to size constraints), the pools have all the parts

necessary to be assembled into an above ground pool. Pl.’s Br. at 2; Def.’s Br. at 5. Each pool is packaged together and exported on the same U.S. Customs and Border Protection (“CBP”) form 7501. Id.

On November 28, 2017, Company X filed a scope ruling request with Commerce to determine whether its finished pool products are subject to the Order. On May 10, 2018, Commerce issued a scope ruling to Company X stating that its pool products fell within the scope of the Order. Commerce reasoned that its practice for evaluating products in which potentially subject merchandise is included in a larger product is governed by the Federal Circuit’s decision in Mid Continent and that the inclusion of CORES in Company X’s pools did not bring it outside the scope of the Order. See Final Scope Ruling. Plaintiff Company X filed a complaint against the United States (“the Government”) challenging Commerce’s final scope determination on July 16, 2018.

DISCUSSION

I. Company X’s Pool Products Do Not Fit Within the Plain Language of the Scope of the Order

a. The Scope of the Order Does Not Cover Downstream Products

Company X argues that the Department’s Final Scope Ruling failed to consider the plain language of the Order in applying the antidumping duty for CORES from China and Italy on its finished pools and finished pool walls because the pool products were neither specifically included nor reasonably interpreted to be included under the Order, as required by Duferco Steel, Inc. v. United States (“Scope orders may be interpreted as including subject merchandise only if they

contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it.”). 296 F.3d 1087, 1089 (Fed. Cir. 2002)). Pl.’s Br. at 10. Thus, Commerce’s determination was not based upon substantial evidence or otherwise in accordance with law. Id.

Company X draws a parallel to A.L. Patterson, Inc. v. United States, 585 Fed. Appx. 779 (Fed. Cir. 2014), arguing that fully finished end-products, like its pools and pool walls, were never intended to be included by the Petitioners as part of the scope of the investigation. Pl.’s Br. at 16. In Patterson, the Federal Circuit considered whether the scope of an order includes merchandise facially covered by the terms of the antidumping order, but which had not been a part of the underlying investigation. The court ultimately rejected Commerce’s determination that steel *coil* rods imported from China fell within the scope of an antidumping order on steel rods because coil rods were a distinct product in a different domestic industry than the steel *threaded* rods the ITC investigated. Id. Instead, evidence showed that Patterson’s coil rods were physically distinguishable from the steel threaded rods that were the focus of the original petition, the petition neither mentioned coil rods nor any of the uses of coil rods, no domestic producers of coil rods were included in the description of the domestic threaded rod industry, and there was no evidence that at the time of the petition coil rods were interchangeable with threaded rods or intended to be subject to the duties. Id.

Company X points out that like in Patterson, there is nothing in the record of the original investigation that demonstrates that fully finished end-products were intended to be included by Petitioners as part of the scope of the investigation. Pl.’s Br. at 16. This argument is persuasive when examining the language of the Order. While the Order thoroughly details the chemical content of the subject merchandise and intended uses, nowhere does it state that the scope covers

finished products such as cars, appliances or pools. In Patterson, review of the record as a whole included evidence that coil rods were excluded from the ITC and Commerce’s investigations. Patterson, 585 Fed Appx. at 784. Because no evidence showed that when the petition was filed it intended to include or mention coil rods, the record did not support a finding that they were covered by the Order. Similarly, Company X argues that because the record here evinces no evidence of consideration of downstream products within the Petition filed with Commerce or the ITC investigation, they are reasonably interpreted to be excluded from the scope of the Order. Pl.’s Br. at 17. Company X’s argument is buttressed by the producers of CORES filing the Petition, not domestic producers of above ground pools. As Company X highlights, the entities affected by the purported dumping are those who produce the raw input of CORES, not finished products. Pl.’s Reply at 11–12. Furthermore, the ITC questionnaires for the preliminary phase of the original investigation only collected pricing data for mill sheet products, not downstream items. See ITC Investigation. Thus, Commerce’s determination that Company X’s product fell within the scope of the Order is not supported by substantial evidence.

The Government tries to distinguish Patterson by pointing out that in this case, the CORES used in Company X’s finished pool products is specifically covered by the Order, whereas in Patterson no part of the coil rod was under the Order. The Government contends that because the CORES components fall within the plain language of the scope of the Order, considering other sources in determining the plain meaning of the Order is inconsistent with Mid Continent’s guidance that Commerce should consider the (k)(1) sources as part of the first step of a mixed-media analysis only if it identifies an ambiguity in an Order’s plain language. Def.’s Br. at 17. Here, as the Government argues, Company X’s pools fall directly within the language of the Order, because Company X’s pool walls undergo the “further processing” that the Order encompasses.

Def.'s Br. at 18 (citing the Order: "Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching and/ or slitting or any other processing that would not otherwise remove the merchandise from the scope of the Order"). But the Government does not explain why the pool walls were merely processed as opposed to substantially transformed, as Company X argues. Instead, they simply state that "the further processing Company X's CORE[S] components undergo is not to such an extent that the CORE[S] becomes physically distinguishable as a separate product or is transformed into a different product, like the steel threaded rods in Patterson." Def.'s Br. at 18. However, in Patterson the coil rods were not considered separate from the scope of the Order because of their physical attributes, but instead because it was a distinct product occupying a different market from the thread rods. So too here are the pool walls a distinct product. Thus, the Government's argument that the "processing" Company X's CORES undergoes keeps it within the scope of the Order is unavailing.

Furthermore, Company X demonstrates that downstream products were never considered as part of the ITC's injury analysis despite 19 U.S.C. § 1673 requiring an injury determination prior to the imposition of antidumping duties. Instead, the ITC's injury investigations were focused on pricing data for CORES and other raw inputs, not fully finished products like Company X's pools and pool walls. See Company X's Initial Scope Request, P.R. 1, at 9; P.R. 4, at Att. 7. Nowhere in the Government's brief does it address the critical requirements of an injury determination. Company X persuasively argues that allowing Commerce to include downstream products would "frustrate the purpose of the antidumping laws because it would allow Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation." Pl.'s Reply at 15 (quoting Wheatland Tube Co. v. United States, 161 F.3d 1365, 1371 (Fed. Cir. 1998)).

While one could imagine an argument that domestic producers of CORES are injured by the use of CORES from China and Italy as an input for Company X's pools, the Government does not consider this possibility, nor did Commerce address it. Instead, its briefing to this court is devoid of any evidence on the record of injury to a domestic industry or sales at less than fair value. Thus, Commerce's decision is not in accordance with the law.

Finally, Company X compares the minimal manufacturing process required for CORES to the elaborate process its pools necessarily go through as evidence that the pools are not subject to the Order. Pl.'s Br. at 17. While such a difference is not dispositive, it is further evidence that the Order did not consider fully finished downstream products within its scope. Furthermore, as with the injury determination, the Government fails to address these differences. See generally Def.'s Br.

The Government further contends that the Petition and ITC Final Determination specifically discussed the use of CORES in many applications, including construction applications similar to Company X's use (CORES is used "in the manufacture of automobile bodies, in appliances, and in commercial and residential buildings and other construction applications.")). Final Scope Ruling. Thus, the Government argues Commerce reasonably determined that the (k)(1) sources indicate that it was contemplated during the investigations that CORES would continue to be subject merchandise if included within larger products like Company X's finished pool products. Def.'s Br. at 15–16. However, the Government relies on no authority for the proposition that discussing end-uses of products includes those end-uses within the scope of the order. Without such authority, the passing references to the type of finished products produced from subject CORES cannot be interpreted as proof that the parties contemplated that finished products would be subject to the scope of the Order. Furthermore, accepting such an argument may lead to absurd

and perverse outcomes. If the court were to adopt Commerce’s interpretation of the Order to include all downstream products, then an array of finished consumer products which includes CORES inputs would be covered by the Order. Such products covered would include automobile bodies, automobiles and trucks, appliances, industrial equipment, and more. Surely this result is not what Commerce intended when drafting the Order.

d. The Government Does Not Explain Why Company X’s Products Are Mixed-Media Products, Subject to the Mid Continent Analysis

The Government’s main argument relies on Mid Continent, 725 F.3d 1295 and states that as a mixed-media item, Company X’s pools fall under the scope of the Order based on the two-step framework laid out by the Federal Circuit. Def.’s Br. at 21–22. In Mid Continent, the court considered whether subject merchandise (nails) packaged and imported with non-subject merchandise (assorted household tools) as a part of a mixed-media tool kit was subject to an antidumping order that in terms covered the nails. The court held that the nails remained within the scope of the order yet noted “Commerce has historically treated the answer to this question as depending on whether the mixed-media item is treated as a single, unitary item, or a mere aggregation of separate items.” Id. at 1298. In this case, Commerce did not take the initial step of proving that the pool walls are not unique products. Mixed-media items, as defined by Walgreen Co. v. United States, are a set of products that are “merely a combination of subject and non-subject merchandise, and not a unique product.” 620 F.3d 1350, 1355 (Fed. Cir) (emphasis added). Walgreen dealt with whether the packaging of tissue paper in gift bag sets took the tissue paper out of the scope of the Final Order for cut-to-length sheets of tissue paper. Id. The Walgreen court emphasized the tissue paper retained its individual character despite being packaged with the rest

of the gift bag sets in holding that the gift sets were not unique products and the tissue paper was subject to the order. Id. at 1357. Such an analysis makes intuitive sense. When a product subject to an antidumping duty order retains its individual character, the underlying purpose behind the order is not defeated. Here, however, the Government never determines Company X’s products are “merely a combination of subject and non-subject merchandise” before applying Mid Continent.

Company X brings to our attention a case this court recently decided -- Maclean Power -- which dealt with a similar issue. 43 CIT __, __, 359 F. Supp. 3d 1367 (“Maclean”). In Maclean, this court determined that helical spring lock washers (“HSLW”) incorporated within pole line hardware fell outside the scope of the HSLW order. Id. In so doing, this court warned that “Commerce put the cart before the horse” and held that “[b]efore applying the various guidance in Mid Continent, Commerce was first required to address the pole line hardware in its assembled condition.” Maclean Power 43 CIT __, __, 359 F. Supp. 3d at 1372, N.3. The court distinguished the HSLW from the nails in Mid Continent by noting:

“[A] tool box retains its essential character when it excludes nails, as do the nails by themselves. But the HSLWs at issue here are not alleged to be imported for use in anything other than the pole line hardware. The pole line hardware cannot perform their intended functions without the HSLWs, or the remainder of their components functioning together.”

Id. at 1373.

Thus, just as the HSLW lost its essential function when incorporated into the pole line hardware, so too does the subject CORES when incorporated into Company X’s pool products. Even if Commerce’s Mid Continent analysis was sufficient to show that Company X’s product fell within the order, its determination was still not in accordance with law because it did not address whether its product was a mixed-media item or unique product in the first place. Company X also

demonstrates that Commerce’s past precedent includes finding that subject merchandise incorporated into a larger product constitutes non-subject merchandise, see e.g., Final Scope Determination Regarding Refrigerant Distributor Assemblies Manufactured and Imported by Danfoss LLC (Nov. 10, 2016) (holding that the order covers pipe and tube, but does not extend to further manufactured composite goods consisting of copper pipe and tube combined with other non-copper pipe and tube elements). Such a ruling provides further evidence that downstream products, distinct from mixed-media items, do not fall within the Order.

In its brief, the Government does not discuss the “unique product” distinction anywhere. By simply jumping into the mixed-media analysis, the Government fails to explain why Company X’s pools should be considered a mixed-media item or grapple with the precedent laid down in Walgreen or Maclean. In this case, the record evidence shows that Company X’s pools and pool walls are single unitary items, not mixed-media goods consisting of independently packaged items sold together as a set. Thus, by failing to consider the record as a whole before applying Mid Continent, Commerce’s Final Scope Ruling was unsupported by substantial evidence in the underlying record.

Applicant Details

First Name	Samuel
Last Name	Weitzman
Citizenship Status	U. S. Citizen
Email Address	sew2197@columbia.edu
Address	<div> Address Street 234 Mulberry Street, Apt. 7 City New York State/Territory New York Zip 10012 Country United States </div>
Contact Phone Number	4405910715

Applicant Education

BA/BS From	Tufts University
Date of BA/BS	May 2018
JD/LLB From	Columbia University School of Law
	http://www.law.columbia.edu
Date of JD/LLB	April 29, 2021
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Columbia Journal of Law and Social Problems
Moot Court Experience	Yes
Moot Court Name(s)	Harlan Fiske Stone Moot Court Competition

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	Yes

Specialized Work Experience

Recommenders

Bulman-Pozen, Jessica
jbulma@law.columbia.edu
212-854-1028

Strauss, Peter
strauss@law.columbia.edu
212-854-2370

Waxman, Matthew
mwaxma@law.columbia.edu
212-854-0592

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Samuel E. Weitzman
234 Mulberry Street, Apt. 7
New York, NY 10012
(440) 591-0715 ▪ sew2197@columbia.edu

January 29, 2022

The Honorable Eric N. Vitaliano
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse 225
Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am an associate at WilmerHale and a 2021 graduate of Columbia Law School, and I write to express my interest in a clerkship in your chambers. From August 2022 until July 2023, I will be clerking for Judge Harris Hartz of the U.S. Court of Appeals for the Tenth Circuit. Accordingly, I am seeking a position for the 2023–24 term or any term thereafter.

I believe that my proficiency in legal research and writing, in conjunction with my abiding passion for law as both theory and practice, would allow me to succeed and thrive as your clerk. While at Columbia, I frequently sought out — and prospered in — opportunities to immerse myself in law. In addition to earning consistently high marks in my coursework, I accumulated a diverse set of extracurricular experiences, including as a student fellow of the National Security Law Program, as a research assistant for four professors, as the author of a Note published by the *Columbia Journal of Law and Social Problems* (for which I served as a Managing Editor), and as a semifinalist in the 2021 Harlan Fiske Stone Moot Court Competition. Both inside and outside the classroom, I have been a vivacious, easy-going, capable, and tireless worker both individually and as a member of a team.

Enclosed please find my résumé, transcripts, and writing sample. Following separately are letters of recommendation from Professors Matthew C. Waxman (212-854-0592; mwaxma@law.columbia.edu), Jessica Bulman-Pozen (212-854-1028; jbulma@law.columbia.edu), and Peter L. Strauss (212-854-2370; strauss@law.columbia.edu).

Should you need any additional information, please do not hesitate to contact me. Thank you in advance for your consideration for this position.

Respectfully,

Samuel E. Weitzman

SAMUEL E. WEITZMAN

234 Mulberry Street, Apt. 7, New York, NY 10012
(440) 591-0715 ▪ sew2197@columbia.edu

EDUCATION

Columbia Law School, New York, NY

J.D., April 2021

Honors: James Kent Scholar (2L and 3L); Harlan Fiske Stone Scholar (1L); Best in Class (Advanced Administrative Law); Harlan Fiske Stone Moot Court Competition Semifinalist (3L)

Activities: *Columbia Journal of Law and Social Problems*, Managing Editor
Student Fellow of the National Security Law Program
Research Assistant to Professors Gillian E. Metzger, Matthew C. Waxman, Peter L. Strauss, and Jedediah S. Purdy
Teaching Assistant to Professors Peter L. Strauss (Advanced Administrative Law) and Jane C. Ginsburg (Legal Methods II)
Loquitur Public Speaking and Rhetoric Club, Events Chair (1L and 2L)

Tufts University, Medford, MA

B.A., *summa cum laude*, May 2018

Majors: International Relations and Philosophy

Honors: Phi Beta Kappa; Dean's List (all semesters); Distinguished Achievement Award in International Relations; Frederick M. and Dorie Ellis Prize; Honos Civicus Society

Activities: Alliance Linking Leaders in Education and the Services, Co-Leader
The Tufts Daily, Sports Editor

EXPERIENCE

Hon. Harris Hartz, U.S. Court of Appeals, Tenth Circuit, Albuquerque, NM

Law Clerk

2022–2023 Term

Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY

Summer Associate (offer accepted)

Summer 2020

Researched and wrote first draft of a response to a motion to dismiss in a federal trademark and patent law case. Co-authored memorandum on a novel issue of evidence law. Explored and summarized statutory and decisional law relating to the use of videoconferencing in criminal proceedings.

Hon. George B. Daniels, U.S. District Court, S.D.N.Y., New York, NY

Judicial Extern

Fall 2019

Researched novel legal issues and drafted sections of official opinions and orders. Bluebooked, cite checked, and proofread full drafts. Completed administrative tasks.

Communities Resist (formerly a division of Brooklyn Legal Services Corporation A), Brooklyn, NY

Intern

Summer 2019

Drafted motions and memoranda filed on behalf of low-income tenants in housing and state court. Conducted legal research assignments.

Atlantic Council, Washington, D.C.

Global Business and Economics Intern

Summer 2017

Researched and wrote articles about macroeconomic policy published online. Researched and drafted a large section of a major issue brief about economic sanctions alignment.

PUBLICATIONS

Back to Good: Restoring the National Emergencies Act. 54 COLUM. J.L. & SOC. PROBS. 365 (2021).

(with Matthew Waxman) *Remembering the Montgomery Ward Seizure: FDR and War Production Powers*.

LAWFARE (Apr. 25, 2020).

A Farewell to Arms: Explaining Ukraine's Decision to Forgo Nuclear Weapons. 19 J. INT'L RELS. 9 (2017).

Registration Services

law.columbia.edu/registration
 435 West 116th Street, Box A-25
 New York, NY 10027
 T 212 854 2668
 registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/20/2021 11:47:47

Program: Juris Doctor

Samuel E Weitzman

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	Wu, Timothy	3.0	A
L6630-2	Journal of Law and Social Problems Editorial Board		1.0	CR
L8795-1	S. Food Law and Policy	Chanoine, Hannah; Weinberg, Seth	2.0	A+
L9328-1	S. Political Theory and the 1st Amendment	Blasi, Vincent; Verrilli, Donald B.; Wu, Timothy	3.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Waxman, Matthew C.	1.0	A
L6685-2	Serv-Unpaid Faculty Research Assistant	Strauss, Peter L.	1.0	A
L6822-1	Teaching Fellows	Strauss, Peter L.	3.0	CR

Total Registered Points: 14.0**Total Earned Points: 14.0**

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6341-1	Copyright Law	Wu, Timothy	3.0	A
L6425-1	Federal Courts	Metzger, Gillian	4.0	A
L6630-2	Journal of Law and Social Problems Editorial Board		1.0	CR
L6474-1	Law of the Political Process	Briffault, Richard	3.0	A-
L6680-1	Moot Court Stone Honor Competition	Richman, Daniel; Strauss, Ilene	0.0	CR
L6274-2	Professional Responsibility	Fox, Michael Louis	2.0	A-

Total Registered Points: 13.0**Total Earned Points: 13.0**

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6246-1	Advanced Administrative Law	Strauss, Peter L.	3.0	CR
L6231-2	Corporations	Pistor, Katharina	4.0	CR
L6630-1	Journal of Law and Social Problems		0.0	CR
L6981-1	Modern Constitutional Interpretation & Scholarship	Amar, Akhil	4.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Waxman, Matthew C.	1.0	CR
L6685-2	Serv-Unpaid Faculty Research Assistant	Purdy, Jedediah S.	1.0	CR
L6683-1	Supervised Research Paper	Strauss, Peter L.	1.0	CR
L6822-1	Teaching Fellows	Louk, David S	1.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Roth, Jessica	3.0	A
L6661-1	Ex. Federal Court Clerk - SDNY [Minor Writing Credit - Earned]	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6630-1	Journal of Law and Social Problems		0.0	CR
L6675-1	Major Writing Credit	Strauss, Peter L.	0.0	CR
L6220-1	Mass Torts	Ohlemeyer, William	3.0	A
L6680-1	Moot Court Stone Honor Competition	Richman, Daniel; Strauss, Ilene	0.0	CR
L8862-1	S. Constitutional War Powers	Waxman, Matthew C.	3.0	A
L6683-1	Supervised Research Paper	Strauss, Peter L.	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Greene, Jamal	4.0	A
L6108-1	Criminal Law	Rakoff, Jed	3.0	B+
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-7	Legal Practice Workshop II	Kosman, Joel	1.0	HP
L6169-2	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A
L6116-3	Property	Heller, Michael A.	4.0	A-

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.; Louk, David S	1.0	CR

Total Registered Points: 1.0**Total Earned Points: 1.0****Fall 2018**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Landau, Joseph	4.0	A
L6105-3	Contracts	Morrison, Edward R.	4.0	B+
L6113-2	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-7	Legal Practice Workshop I	Kosman, Joel; Whaley, Hunter	2.0	P
L6118-2	Torts	Underhill, Kristen	4.0	A-

Total Registered Points: 15.0**Total Earned Points: 15.0****Total Registered JD Program Points: 89.0****Total Earned JD Program Points: 89.0****Best In Class Awards**

Semester	Course ID	Course Name
Spring 2020	L6246-1	Advanced Administrative Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	3L
2019-20	James Kent Scholar	2L
2018-19	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	3.0

TUFTS UNIVERSITY
College of Liberal Arts

For more Transcript Key information, visit <http://go.tufts.edu/transcript>

Name: Samuel E. Weitzman

Student ID: 1161092 **Birthdate:** 02/10/####

Print Date: 05/20/2020

Advisor: Ioannis Evrigenis, Erin Kelly

Academic Program History

12/26/2013: College of Liberal Arts
 Applicant
 12/26/2013: Major - Undecided Major

03/20/2014: College of Liberal Arts
 Admitted
 03/20/2014: Major - Undecided Major

04/30/2014: College of Liberal Arts
 Active in Program
 04/30/2014: Major - Undecided Major

02/11/2016: College of Liberal Arts
 Active in Program
 02/11/2016: Major - International Relations Major

11/29/2016: College of Liberal Arts
 Active in Program
 11/29/2016: Major - Philosophy Major
 11/29/2016: Major - International Relations Major

09/22/2017: College of Liberal Arts
 Active in Program
 09/22/2017: Major - Philosophy Major
 09/22/2017: Major - International Relations Major

11/28/2017: College of Liberal Arts
 Active in Program
 11/28/2017: Major - Philosophy Major
 11/28/2017: Major - International Relations Major

05/17/2018: College of Liberal Arts
 Active in Program
 05/17/2018: Major - Philosophy Major
 05/17/2018: Major - International Relations Major

05/21/2018: College of Liberal Arts
 Completed Program
 05/21/2018: Major - Philosophy Major
 05/21/2018: Major - International Relations Major

Send To: Samuel E. Weitzman

TUFTS UNIVERSITY
College of Liberal Arts

For more Transcript Key information, visit <http://go.tufts.edu/transcript>

Name: Samuel E. Weitzman
 Student ID: 1161092 Birthdate: 02/10/####

Print Date: 05/20/2020

Degrees Awarded

Degree: Bachelor of Arts
 Confer Date: 05/20/2018
 Degree Honors: Summa Cum Laude
 Major - International Relations
 Major - Philosophy

Test Credits

Test Credits Applied Toward College of Liberal Arts

Course	Description	Earned
EC AP	AP Economics	1.000
ENG 01/2	Ap English 5	1.000
HIST AP	Ap History	1.000
HIST AP	Ap History	1.000
MATH 0034	Calculus II	1.000

Course	Description	Earned
SPN 0004	Intermed Spanish II	0.000
SPN 0002	Elem Spanish II	0.000

Test Credits Total 5.000

Tufts Credits

Fall Term 2014

Course	Description	Earned	Grade	Points
EC 0005	Principles Of Economics	1.0	A-	3.667
HIST 0065	Great Britain And The British Empire	1.0	A	4.000
ITAL 0051	Dante's Inferno	1.0	A	4.000
SPN 0021	Composition And Conversation I	1.0	A-	3.667

	GPA	Attempted	Earned	GPA Units	Points
Term	3.83	4.00	4.0	4.00	15.33
Cumulative	3.83	4.00	9.0	4.00	15.33

Term Honor: Dean's List

TUFTS UNIVERSITY
College of Liberal Arts

For more Transcript Key information, visit <http://go.tufts.edu/transcript>

Name: Samuel E. Weitzman
Student ID: 1161092 **Birthdate:** 02/10/####

Print Date: 05/20/2020

Spring Term 2015

<u>Course</u>	<u>Description</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ITAL 0052	Dante's Purgatorio And Paradiso	1.0	A+	4.000
PHIL 0033	Logic	1.0	B+	3.333
PHIL 0168	Newton's Principia	1.0	A	4.000
PS 0061	Introduction To International Relations	1.0	A	4.000
SPN 0022	Composition And Conversation II	1.0	A-	3.667

	<u>GPA</u>	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term	3.80	5.00	5.0	5.00	19.00
Cumulative	3.81	9.00	14.0	9.00	34.33

Term Honor: Dean's List

Fall Term 2015

<u>Course</u>	<u>Description</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
FAH 0001	Introduction to World Art I	1.0	B-	2.667
PHIL 0001	Introduction To Philosophy	1.0	A-	3.667
PHIL 0041	Introduction to Philosophy	1.0	A	4.000
PHY 0006	Western Political Thought I	1.0	A	4.000
SPN 0030	Physics For Humanists	1.0	A	4.000
	Modern Spanish Literature: 18th to 21st Century	1.0	A	4.000

	<u>GPA</u>	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term	3.67	5.00	5.0	5.00	18.33
Cumulative	3.76	14.00	19.0	14.00	52.67

Term Honor: Dean's List

Spring Term 2016

<u>Course</u>	<u>Description</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ILVS 0088	Warrior Nations: Russia & U.S.	1.0	A	4.000
PHIL 0042	Western Political Thought II	1.0	A	4.000
PHIL 0123	Philosophy Of Law	1.0	A	4.000
PS 0160	Force, Strategy And Arms Control	1.0	A	4.000
PS 0168	International Law	1.0	A	4.000

	<u>GPA</u>	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term	4.00	5.00	5.0	5.00	20.00
Cumulative	3.82	19.00	24.0	19.00	72.67

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Name: Samuel E. Weitzman
Student ID: 1161092 **Birthdate:** 02/10/####

Print Date: 05/20/2020

Term Honor: Dean's List

Fall Term 2016

<u>Course</u>	<u>Description</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ENG 0114	Milton	1.0	A-	3.667
HIST 0053	Europe To 1815	1.0	A	4.000
PHIL 0091	Special Topics Paradoxes and Dilemmas	1.0	A+	4.000
PHIL 0197	Seminar In Ethics, Law, And Society Ethics Law & Society	1.0	A	4.000
PS 0142	Ethics and International Relations	1.0	A	4.000

	<u>GPA</u>	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term	3.93	5.00	5.0	5.00	19.67
Cumulative	3.85	24.00	29.0	24.00	92.33

Term Honor: Dean's List

Spring Term 2017

<u>Course</u>	<u>Description</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ENG 0134	James Joyce's Ulysses	1.0	A	4.000
PHIL 0192	Seminars Law & Institutions	1.0	A-	3.667
PS 0118	Topics in American Politics Courts and Social Policy	1.0	A+	4.000
PS 0151	Seminar: The Political Philosophy Of Hobbes	1.0	A	4.000
SPN 0121	Advanced Composition And Conversation I	1.0	B+	3.333

	<u>GPA</u>	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term	3.80	5.00	5.0	5.00	19.00
Cumulative	3.84	29.00	34.0	29.00	111.33

Term Honor: Dean's List

Fall Term 2017

<u>Course</u>	<u>Description</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
EC 0060	International Economics	1.0	A	4.000
ENG 0011	Intermediate Journalism	1.0	A	4.000
HIST 0024	Revolutionary America, 1763-1815	1.0	A	4.000
PHIL 0133	Philosophy Of Language	1.0	A	4.000

TUFTS UNIVERSITY
College of Liberal Arts

For more Transcript Key information, visit <http://go.tufts.edu/transcript>

Name: Samuel E. Weitzman
Student ID: 1161092 **Birthdate:** 02/10/####

Print Date: 05/20/2020

	<u>GPA</u>	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term	4.00	4.00	4.0	4.00	16.00
Cumulative	3.86	33.00	38.0	33.00	127.33

Term Honor: Dean's List

Spring Term 2018

<u>Course</u>	<u>Description</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ENG 0151	Poe / Hawthorne / Melville	1.0	A	4.000
PS 0140	Liberalism And Its Philosophical Critics	1.0	A-	3.667
PS 0141	Shakespeare's Rome	1.0	A	4.000
PS 0159	Seminar In Political Thought Popular Sovereignty	1.0	A	4.000

	<u>GPA</u>	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term	3.92	4.00	4.0	4.00	15.67
Cumulative	3.86	37.00	42.0	37.00	143.00

Term Honor: Dean's List

AS&E Undergrad Career Totals

Combined Cum GPA	3.86				
Totals		42.00	42.0	37.00	143.00

Honors and Awards

Spring 2018 - The Frederick M. and Doris Ellis Prize
Spring 2018 - The Distinguished Achievement Award in International Relations

End of College of Liberal Arts

January 29, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am delighted to recommend Samuel Weitzman for a clerkship in your chambers. Sam recently graduated with honors from Columbia Law School, and he is an avid and enthusiastic learner, an engaging interlocutor, and a lovely person. I recommend him to you highly.

I met Sam during the spring of his first year of law school, when he enrolled in my Legislation and Regulation course. Sam was one of the top students in the class, earning an A based on his final exam performance. He was also a pleasure to have in class. Over the course of the semester, he proved particularly adept at analyzing how legal doctrines might apply to contemporary events. In both class discussions and office hours conversations, he offered smart thoughts and interesting questions about a range of topics, from the legal consequences of *INS v. Chadha* for the President's declaration of a national emergency to build a wall at the U.S.'s southern border, to the impact of the special counsel regulations on Robert Mueller's investigation, to how the nondelegation doctrine might be revived in (then-pending) *Gundy v. United States*. He was reliably engaged, perceptive, and generous toward others in these discussions.

I was pleased that Sam had an opportunity to deepen his knowledge of administrative law through both coursework and independent research and writing during his second year of law school. Among other things, he completed a note about the National Emergencies Act for the Columbia Journal of Law and Social Problems. The note is an excellent piece of work that argues that Congress can, and should, restore the original termination procedures of the National Emergencies Act. Initially, only a concurrent resolution was required to terminate a presidentially declared emergency, but in the wake of *Chadha*, Congress amended the Act to require a joint resolution, and thus invite a possible presidential veto. Although members of Congress assumed *Chadha* required such a change, Sam argues that this assumption was incorrect and that the concurrent resolution procedure was constitutionally permissible because it was a political rather than regulatory legislative veto.

The note showcases a number of Sam's strengths that would serve him well as a clerk: excellent original research into the drafting history of the National Emergencies Act and its 1985 amendment, cogent doctrinal analysis, and strong and clear writing. Sam has also demonstrated his interpersonal and organizational skills in other undertakings. Beyond his strong performance in law school courses, for example, he served as the managing editor of the Columbia Journal of Law and Social Problems, the events chair of the public speaking club, a volunteer with Sanctuary for Families, and a judicial extern working at the U.S. District Court for the Southern District of New York.

I am confident Sam will make wonderful law clerk. I would be happy to speak further about his application, so please do not hesitate to contact me if I can be of any further assistance. The best way to reach me is by email or cell phone (203-228-4743).

Sincerely yours,

Jessica Bulman-Pozen

Jessica Bulman-Pozen - jbulma@law.columbia.edu - 212-854-1028

January 29, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

This letter comes as an enthusiastic recommendation of Samuel Weitzman, who is soon to graduate from Columbia, for the responsibilities and honor of a clerkship in your chambers. I have come to know him as a student, through a remarkable "major writing" research paper he prepared under my supervision last year, and through his work for me as both research assistant and teaching assistant this spring. This recommendation letter for him is as positive and unreserved as any I ever write.

Sam was first my student in my large section of our introductory Legal Methods class, which is given credit-fail, and was examined in a way that permitted no real appraisal of talent. Last Spring, however, in my class of 35 studying Advanced Administrative Law, he was by any measure the best student in the class – demonstrated not only by a brilliant examination and by his insightful contributions to classroom discussions, but also by a comment he voluntarily wrote for submission to the Department of Transportation in mid-semester, in a proposed rulemaking concerning the carriage of service animals on airplane flights. (I have regularly encouraged my Administrative Law students to undertake comment-writing, in a rulemaking of their choice, as a way of giving concreteness to this unfamiliar procedure and the internet resources available in it.) Sam's comment was thoroughly grounded in research, sensitive to the realities of airplane interiors and to the interests of all – airline personnel and other passengers as well as the person needing her animal; it was beautifully written, highly nuanced and persuasive. It was easy to designate him as "Best in Class," a singular honor we were been permitted to award one student in a semester the Covid19 pandemic caused all our courses to be graded as my Legal Methods class had been, credit-fail. I've very rarely given A+'s in my long teaching career, but if that had been possible this semester, I am confident that is the grade I would have awarded him.

Our law school's required "major paper" is to be a significant research undertaking under faculty guidance, requiring the student to produce work on the order of a law review note or comment. Mr. Weitzman's paper was an analysis of the National Emergencies Act – an issue of some significance in the current social and political environment. The research and writing skills, and the intelligence and objectivity of his analyses, in my judgment, would have merited the prize the faculty annually awards to the graduating student who has, in its judgment, written the best paper on any legal subject. As he was then a second year student, not a graduate, so you have only my judgment on this. I am somewhat confirmed in it by knowing that last year Sam also worked as a research assistant for my colleague Matthew Waxman, from whom you may also be hearing about him; that work led Professor Waxman to make him a coauthor on the resulting essay for the Brookings Institution's influential Lawfare weekly. Columbia faculty have rarely honored their students in this way.

Last fall I agreed to contribute to a festschrift being organized for a distinguished Italian scholar and good friend, and decided to write about presidential transitions – anticipating that the one we have since been experiencing would be both difficult and hard for European academics, used to parliamentary democracies, to understand. I asked Sam if he would be my research assistant this spring, which he agreed to do. I had recommended him to a colleague who was going to teach the course I had taught the previous spring; when at the last moment she was unable to do so, and I was asked again to teach the course, he joined me as my teaching assistant, also. Both relationships have been ideal. His research on transition issues, guided to some extent but also self-generated, has been extremely helpful – wide-ranging, thorough, imaginative and deep. As a TA he has done all I could possibly have asked of him, in a relationship that has been from my perspective ideal – cordial, respectful, and the occasion for numerous thoughtful discussions about issues arising in the class. He has a pleasant, level-headed personality and a capacity for listening to advice and criticism that I imagine you would find ideal.

I am hardly the only teacher to have responded favorably to his work. He came to us from a challenging education at Tufts, full of prizes and publications, and ending in graduating with highest honors. After a very strong first year here, he was a Kent Scholar last year, and seems likely to repeat that achievement this year. To end where I began, I recommend Mr. Weitzman to you with the greatest pleasure and confidence, in a letter as positive and unreserved as any I ever write.

Yours truly,

Peter L. Strauss
Betts Professor of Law Emeritus

Peter Strauss - strauss@law.columbia.edu - 212-854-2370

January 29, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am delighted to recommend Samuel Weitzman, an outstanding student and research assistant, for a clerkship in your chambers. He would make a superb clerk.

Sam was a student during his 2L year in my seminar on Constitutional War Powers, an intensive writing course that required students to research, compose, and revise several memos during the semester. His research, written work, and oral presentations in class were so spectacular that I asked him to serve as my research assistant the next semester. I am very fortunate that he accepted.

In his first seminar memo, Sam analyzed two presidential power cases from the late nineteenth century, *In re Neagle* (1890) and *In re Debs* (1895). After explaining how the cases' holdings suggest a presidential power to take protective actions without prior statutory authorization, Sam articulated the implications of this view for constitutional war powers. In his second memo, Sam explored the legislative history and applications of the United Nations Participation Act of 1945. In so doing, he argued that the pragmatic, power-sharing approach to constitutional war powers taken in 1945 soon gave way to a President-centric practice, which came at the cost of congressional input in decisions on the use of force abroad.

Both of these memos were top-notch. They were meticulously researched and beautifully written. Throughout the semester, Sam's comments in class were always on target, and he has a great ability to drill down into doctrinal details while maintaining a clear view of broader considerations.

Sam has been a fantastic research assistant. Besides the skills described above, he is able to anticipate my likely follow-on questions, and he energetically pursues angles on questions that I had not yet thought of myself. He has been an invaluable partner in researching and analyzing issues of presidential powers during World War II, including in some domestic economic interventions that are not well known. Indeed, he was such a terrific partner that we ultimately co-authored a short essay online titled "Remembering the Montgomery Ward Seizure: FDR and War Production Powers." I am eager to collaborate with him again in the future.

Sam is an all-around leader in the Columbia Law School community and a joy to work with. He was named a Harlan Fiske Stone Scholar for academic achievement after his 1L year, and a James Kent Scholar for top academic performance after his 2L year. During both his 1L and 2L years, Sam has been the Events Chair of Loquitur, a public speaking group. During his 2L year, Sam has served as an Assistant Articles Editor of the Columbia Journal of Law and Social Problems (his peers then elected him Managing Editor of the Journal), a pro bono volunteer with the Uncontested Divorce Project at Sanctuary for Families, an Academic Coach tutoring 1Ls, and a research assistant to two professors. He also served as a Teaching Assistant for Professors Jane Ginsburg and David Louk's weeklong intensive 1L course on methods of statutory drafting and interpretation.

Sam plans a career in litigation, and I am confident he will make an outstanding advocate. During the fall of 2019, he served as a judicial extern for the Hon. George B. Daniels of the U.S. District Court in the Southern District of New York. During the summer of 2019, Sam interned with Communities Resist, a Brooklyn-based nonprofit focused on housing rights litigation on behalf of both individuals and tenant groups. Sam speaks often about these past experience, and how they honed his skills and inspired his interest in litigation.

Sam is a superstar. I very highly recommend him.

Sincerely,

Matthew C. Waxman
Livi Librescu Professor of Law

Matthew Waxman - mwaxma@law.columbia.edu - 212-854-0592

HSTPA Retroactivity Memo (Summer 2019)

The Housing Stability and Tenant Protection Act of 2019 (“HSTPA”), signed into law on June 14, 2019, heralded a new era of landlord-tenant relations. *See* Vivian Wang, *New Rent Laws Pass in N.Y.: “The Pendulum Is Swinging” Against Landlords*, N.Y. Times (June 14, 2019), <https://www.nytimes.com/2019/06/14/nyregion/rent-laws-ny-deal.html>. One notable reform is an addition to § 26-408 of the New York City Administrative Code. The new language provides that:

[A] tenant required to surrender a housing accommodation by virtue of the operation of subdivision g or h of this section shall have a cause of action in any court of competent jurisdiction for damages, declaratory, and injunctive relief against a landlord or purchaser of the premises who makes a fraudulent statement regarding a proposed use of the housing accommodation. In any action or proceeding brought pursuant to this paragraph a prevailing tenant shall be entitled to recovery of actual damages, and reasonable attorneys’ fees.

S. 6458, 2019–2019 N.Y. Legis. Sess. pt. I, § 1 (2019). The best reading of the amendment is that it applies retroactively.

Statutory retroactivity is a matter of legislative intent: if a lawmaking body wishes to apply a statute retrospectively, it may do so (within the bounds of the state and federal constitutions). *See Kellogg v. Travis*, 796 N.E.2d 467, 469 (N.Y. 2003). When the legislature does not authorize retroactive application in direct language, most statutes are subject to an initial presumption against retroactivity. *See St. Clair Nation v. City of New York*, 928 N.E.2d 404, 407 (N.Y. 2010) (describing this principle as “well settled under New York law”); *Jacobus v. Colgate*, 111 N.E. 837, 838 (N.Y. 1916) (Cardozo, J.) (“The general rule is that statutes are to be construed as prospective only.”). However, this general rule is *not* all-embracing, and courts have long interpreted numerous statutes as applying retrospectively even in the absence of explicit authorization to do so. *See, e.g., Matter of OnBank & Tr. Co.*, 688 N.E.2d 245, 247–48 (N.Y. 1997); *People ex rel. Collins v. Spicer*, 1 N.E. 680, 684 (N.Y. 1885).

One well-established basis for retroactive application is if the statute is “remedial” in purpose. *In re Marino S.*, 795 N.E.2d 21, 26 (N.Y. 2003); *Duell v. Condon*, 647 N.E.2d 96, 100 (N.Y. 1995); *Burch v. Newbury*, 10 N.Y. (6 Seld.) 374, 392 (N.Y. 1852). A statute is remedial if it is “designed to correct imperfections in prior law, by generally giving relief to the aggrieved party.” *Coffman v. Coffman*, 400 N.Y.S.2d 833, 837 (2d Dep’t 1977) (citation omitted). Such a statute may “create a new right or a new class of individuals who [can] assert a cause of action.” *Clean Earth of North Jersey, Inc. v. Northcoast Maint. Corp.*, 39 N.Y.S.3d 165, 170 (2d Dep’t 2016). Unlike other types of legislation, a remedial statute is subject to a presumption in *favor* of retroactivity, in order to “effectuate its beneficial purpose.” *Marino*, 795 N.E.2d at 26.

Laws on behalf of mistreated tenants are often recognized as remedial and thus retroactive. *See, e.g., Duell*, 647 N.E.2d at 100–101; *Lesser v. Park 65 Realty Corp.*, 527 N.Y.S.2d 787, 790 (1st Dep’t 1988) (“[S]tatutes affording protections to tenants are to be liberally construed as implementing the purposes for which the rent laws were enacted. In this regard, courts have regularly given retroactive effect to remedial housing legislation.”); *Megalopolis Prop. Ass’n v. Buvron*, 494 N.Y.S.2d 14, 18 (2d Dep’t 1985) (similar); *McDermott v. Pinto*, 475 N.Y.S.2d 15, 17 (1st Dep’t 1984) (similar). In *Duell*, the Court of Appeals held that a statute authorizing successful tenants to recover attorneys’ fees from landlords in legal disputes applied retroactively because of the clear legislative purpose of “equaliz[ing] the power of landlords and tenants,” which was “evident from both the language of the statute as well as historical documents.” *Duell*, 647 N.E.2d at 100; *see also Himmel v. Chase Manhattan Bank*, 262 N.Y.S.2d 515, 518 (N.Y. Civ. Ct. 1965) (upholding retrospective application of Article 7-A on a similar basis). Likewise, the First Department in *Lesser* applied the family succession provisions of the 1987 Rent Stabilization Code retroactively in order to uphold the legislative intent to “prevent wholesale evictions” of “family

residents vulnerable to eviction.” *Lesser*, 527 N.Y.S.2d at 789. These examples indicate that, when the New York Legislature enacts a statute to promote the welfare of tenants, the new law applies retrospectively to ensure its remedial aims.

The HSTPA’s amendment to § 26-408 is remedial and thus applies retroactively. To begin with, the HSTPA seeks “to equalize the power of landlords and tenants.” *Duell*, 647 N.E.2d at 100. In their joint press release announcing the agreement, Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie explained that “[f]or too long, power has been tilted in favor of landlords and these measures finally restore equity and extend protections to tenants across the state.” Press Release, N.Y. State Legislature, Statement from Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie on Historic Affordable Housing Legislation (June 11, 2019), <https://nyassembly.gov/Press/files/20190611a.php>. In turn, the HSTPA’s amendment to § 26-408 “correct[s] imperfections in prior law,” *Coffman*, 400 N.Y.S.2d at 837 (citation omitted), by providing tenants a means of redress against landlords who allegedly lied about their intent to invoke the owner’s use exception. Under HSTPA, tenants are now able to initiate a cause of action to challenge landlords who “[made] a fraudulent statement regarding a proposed use of the housing accommodation.” S. 6458, pt. I, § 1. Given the remedial nature of this new cause of action for tenants, it can and should apply retroactively in order to achieve the purpose for which the legislature enacted the HSTPA: namely, “a seismic shift . . . in the relationship between tenants and landlords.” Wang, *supra*.

Another clue as to legislative intent is that when the legislature wanted certain remedial provisions of HSTPA to *not* apply retroactively, it said so specifically. For example, Section 1 of Part J of the law — pertaining to nonprofit charity housing — states that “terms of leases in existence as of the effective date of the chapter of the laws of two thousand nineteen that amended

this paragraph, *shall only be affected upon lease renewal.*” S. 6458, pt. J, § 1 (emphasis added). Similarly, the new caps on individual apartment improvements (“IAIs”) only apply to those IAIs whose corresponding rent increases “tak[e] effect *on or after the effective date* of the chapter of the laws of two thousand nineteen that amended this paragraph.” S. 6458, pt. K, § 1 (emphasis added).

No such limiting language accompanies the HSTPA provisions amending § 26-408. *See* S. 6458, pt. I. This non-inclusion of prospective language should be read in accordance with the well-known linguistic canon of *expressio unius est exclusio alterius*: “where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded.” *Weingarten v. Bd. of Trs. of N.Y.C. Tchrs. ’ Ret. Sys.*, 780 N.E.2d 174, 179 (N.Y. 2002). Here, the New York legislature has provided explicitly for when it did not intend remedial provisions of the HSTPA to apply retroactively. *See* S. 6458, pts. J, K. In other cases, the statute is silent, and the courts should not then act to “create yet another exception” to the general presumption of remedial retroactivity. *Kimmel v. State*, 80 N.E.3d 370, 375 (N.Y. 2017). Thus, the absence of language constraining the amendments to § 26-408 to prospective application confirms that it should apply retroactively.